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Petition No. 90-499

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

ACMAT CORPORATION,

Petitioner,

v.

SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTER-STATEMENT OF THE CASE

A. Prior Proceedings

This is an action by Acmat Corporation ("Acmat") to recover damages for alleged extra work Acmat contends it performed in connection with three asbestos removal contracts with the School District of Philadelphia ("School District"). Acmat commenced this action by Summons and Complaint in the United States District Court for the Eastern District of Pennsylvania on December 9, 1985. The Complaint set forth claims for breach of

contract, breach of warranty, *quantum meruit*, unjust enrichment, fraud, negligence, equitable adjustment, promissory estoppel and under the Racketeer Influenced Corrupt Organizations Act.[1]

Following the completion of discovery, the School District filed a Motion for Summary Judgment on each of Acmat's claims on August 15, 1988. (R.A. 1).[2] The School District advanced the following positions in support of its motion: (1) Acmat was prohibited from recovering on any contractual or quasi-contractual claims for additional work because Acmat failed to obtain the approval of the School Board for the alleged extra work, as required under its contracts and under the provisions of the Pennsylvania Public School Code; (2) Acmat was precluded from recovering delay damages under the terms of its contract; (3) Acmat was barred from contesting the School Board's determination on labor and materials expended in the two instances where the School Board did approve additional work; and (4) Acmat was responsible under its contracts for ascertaining the full scope of its work and had a contractual obligation to perform the work it claimed it was unaware of when it submitted its bids.

Acmat conceded in its response to the motion that as a general rule it would not be able to obtain payment for alleged extra work in the absence of School Board approval. (R.A. 33). However, Acmat argued that an exception existed in those "instances dealing with situations where time is of the essence and the delay in waiting for School Board approval would be detrimental to the citizens of the Commonwealth." (R.A. 34). Acmat also contended it was entitled to pursue its claim since (1) equitable adjustment was "mandated" under the contracts; (2) the extra work arose from "unforeseen conditions"; and (3) a

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1. Acmat's negligence and Racketeer Influenced and Corrupt Organizations Act ("RICO") claims were voluntarily dismissed with prejudice. Acmat's punitive damages and two fraud counts were withdrawn without prejudice. A single fraud count was later reinstated by Acmat.

2. "R.A." refers to the sequentially numbered pages of Respondent's Appendix attached hereto.

factual dispute existed which precluded enforcement of the "no damage for delay" clause. (R.A. 45, 39, 55).

The District Court issued a 22-page Order in response to the School District's motion on December 21, 1988. (App. C 5a-24a).[3] The District Court found that Acmat's contract and quasi-contract claims were barred as a matter of law under the provisions of the Pennsylvania Public School Code due to the absence of School Board approval of the alleged extra work. Acmat's fraud claim was dismissed for failure to state a claim. The District Court also determined that a provision of the contract relating to an equitable adjustment was likewise subject to the provision in the contracts requiring Board approval of all changes in contract scope and price. In response to the unforeseen conditions argument of Acmat, the District Court ruled that Acmat did not comply with the procedures set forth in the contract requiring School Board approval of any change in the scope of work or contract price occasioned by the discovery of conditions not allegedly reasonably anticipated and that Acmat was bound by its contractual responsibility to ascertain the nature and location of the work. Acmat's claim for delay damages was rejected by the Court because it was barred by the specific language of the written contracts.[4] (App. C at 5a-24a).

More than six months after the entry of the Court's Order of December 21, 1988, Acmat moved for reargument of the District Court's earlier order granting partial summary judgment to the School District. (R.A. 68). In addition to reiterating Acmat's prior position that there were unforeseen conditions

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3. Appendices A through J are attached to Acmat's Petition and are numbered sequentially from 1a through 245a.

4. After making these rulings, the District Court, nevertheless, proceeded to determine on an item-by-item basis whether Acmat was entitled to receive damages for individual items of alleged extra work and the amount thereof. At the conclusion of the order, the District Court determined that Acmat was entitled to a total credit of $203,723.79 against the School District's counterclaim. Due to adjustments, this amount was later reduced to $132,420.70. The District Court's decision to award damages to Acmat, notwithstanding the lack of School Board approval, is the subject of the School District's Cross-Petition for a Writ of Certiorari.

and extra work orders by the School District, Acmat now asserted, for the first time, that it was entitled to pursue one category of claims, which was allegedly outside the scope of its contracts. Acmat argued this category of claims was not subject to the contract provisions. Also, Acmat challenged the District Court's entry of summary judgment on its claim for delay damages. Further, for the first time, Acmat challenged, as a matter of public policy, the provision in the contracts that made the School District the final arbiter of Acmat's net costs of labor and materials. (R.A. 86).

The School District filed a motion to strike Acmat's motion for reargument on the grounds it was untimely and did not include any facts or legal arguments which were unavailable to Acmat at the time it filed its original motion response. Following a hearing on Acmat's motion, the District Court denied Acmat's motion for reargument upon concluding that Acmat could have raised its new arguments in its response to the School District's original Motion for Summary Judgment. (App. D at 27a, 51a-52a).

The jury trial on the School District's counterclaim against Acmat took place from July 7 to July 14, 1989. In accordance with the jury's answers to special interrogatories, the District Court entered an Amended Final Judgment on October 14, 1989, in favor of the School District in the amount of $23,480.92 on the School District's Counterclaim for delay damages and in the amount of $16,975.42 on the School District's claims for contract-completion costs. (App. F at 97a). In the same Judgment, the District Court entered judgment in favor of the School District and against Acmat on Acmat's claim for payment of contract balances in the amount of $150,909.14, and deducted the jury award in favor of the School District from the court's earlier summary judgment award to Acmat for a net award to Acmat of $91,964.40. (*Id.*)

Acmat did not file any post-trial motion for a new trial or judgment notwithstanding the verdict. Post-trial motions filed by the School District were denied. Acmat filed an appeal to the United States Court of Appeals for the Third Circuit, and the School District, thereafter, filed a cross-appeal. The Court of

Appeals for the Third Circuit entered a Judgment Order on May 23, 1990, affirming the entry of final judgment by the District Court. (App. A at 1a). Acmat's petition for rehearing was denied by the Court of Appeals on June 22, 1990. (App. B at 3a).

B. Statement of Facts

In the spring of 1984, the School District entered into three separate written fixed-price contracts with Acmat for the removal of asbestos from three schools, the Fairhill Elementary School ("Fairhill"), the Lincoln Senior High School ("Lincoln") and the Rush Middle School ("Rush") in Philadelphia, Pennsylvania. The contracts were duly approved by the Board of Education of the School District of Philadelphia (the "School Board").

Acmat agreed in each of its contracts with the School District that Acmat would be solely responsible for "ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof." (App. E at 88a). Acmat further acknowledged that any failure on its part to ascertain the extent of its work under the contracts would not relieve it of "responsibility for successfully performing the work *without additional expense* to the School District." (*Id.*, emphasis added).

Also, Acmat agreed it would not be entitled to recover delay damages from the School District under any circumstances, including those instances where such delays were caused by acts or neglect of the School District. (App. E at 92a). Instead, Acmat agreed in each of its contracts that it could seek extensions of time to complete its contracts as a result of any delays on the job sites. (*Id.*).

Finally, each contract included a section setting forth the manner in which the contract documents could be modified. (App. E at 90a-91a). The contracts provided that the School District could make changes in the drawings or specifications, but mandated that any such modifications were subject to Board approval. These same procedures applied in those instances

where a contractor [Acmat] claimed it discovered site conditions differing from those shown in the contract drawings and specifications. (*Id.*).

The School District and Acmat agreed, with Board approval, to a single written change order for the work at the Fairhill School. The Board did not approve, nor did the School District ever issue, any change orders with respect to work at the Lincoln School. The parties agreed, with Board approval, to a single written change order at the Rush School. No other change orders or requests for additional compensation were approved by the School Board.

Acmat failed to complete its work at the three work sites within the time required under its contracts with the School District. The total fixed price for all three contracts was $2,001,283. Acmat, however, subsequently sought nearly $6,000,000 for alleged contract extras.

REASONS FOR DENYING THE PETITION

This case involves nothing more than a garden variety contract dispute between an asbestos-removal contractor and a property owner which is limited solely to issues of Pennsylvania law. As such, this case does not satisfy even remotely the standards which would support review on a Writ of Certiorari.

A review on a Writ of Certiorari is not a matter of right, but of judicial discretion. The rules of this Court provide that a Petition for a Writ of Certiorari will be granted "only when there are special and important reasons therefor." Sup. Ct. R. 10. This Court has explained certiorari should be granted only "in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuits." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Rule 10 of the Supreme Court Rules sets forth certain situations in which the Court will consider exercising its discretion to review on a Writ of Certiorari. None of these standards even remotely applies here. This case does not involve a split

between the circuit courts on an important legal issue. More importantly, Acmat voluntarily dismissed its RICO claim and, therefore, has not pursued any claim under federal law against the School District. This case does not involve a situation where a United States court of appeals has decided a federal question in conflict with a state court of last resort or where a United States court of appeals has decided an important question of federal law which was not then, but should be, settled by this Court. Finally, this case does not involve a situation where a court of appeals has sanctioned an action by a District Court which has "departed from the accepted and usual course of judicial proceedings" contemplated by Rule 10, *supra*. As explained more fully below, there was more than an adequate legal and factual basis to support the actions of the District Court.

Acmat asks this Court merely to interpret provisions in asbestos-removal contracts and to interpret provisions of Pennsylvania law governing public school contracts in a fashion which has already been rejected by the District Court and the Court of Appeals. Acmat has failed to present any compelling basis for a review of these state law questions. Furthermore, many of the arguments Acmat has made to this Court and the Court of Appeals were never presented in a timely fashion to the District Court at the time it adjudicated the claims between the parties and are, therefore, beyond this Court's scope of review.

A. The District Court Did Not Deprive Acmat Of Its Procedural Due Process Rights.

In ruling on the School District's Motion for Summary Judgment, the District Court held that the great majority of Acmat's claims against the School District were barred as a matter of law because Acmat had failed to obtain approval in advance for this alleged extra work from the School Board, as required under the terms of its contracts and under the provisions of §5-508 of the Pennsylvania School Code.[5] (App. C at 5a).

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5. The Pennsylvania School Code of 1949 provides, in pertinent part, that:

The District Court, however, determined that Acmat was entitled to additional compensation with respect to a limited number of claims for additional work and determined the amount of additional compensation Acmat was entitled to based on the record before the Court. Acmat now complains that this aspect of the summary judgment Order was improper and that it should have been afforded a hearing to present further evidence concerning its alleged damages.

Significantly, Acmat did not contend at the time it responded to the School District's Motion for Summary Judgment that Paragraph 14(b) of the contracts between Acmat and the School District, making the School District the final arbiter of Acmat's cost of labor and materials, violated public policy or Acmat's due process rights. (R.A. 30). Acmat first raised this due process argument in an untimely motion for reargument of the District Court's order granting, in part, the School District's Motion for Summary Judgment. The District Court denied Acmat's motion for reargument because it concluded that Acmat had raised nothing which could not have been raised by Acmat when it filed its response to the Motion for Summary Judgment. (App. D at 51a-52a). The District Court's refusal to consider these new arguments on a motion for reconsideration was well founded. *See Hutchinson v. So. Central Bell Tel. Co.*, 815 F.2d 1058 (5th Cir. 1987) ("a party who presents his case on one theory and loses should not, in the absence of good reason, be permitted to have a second chance for the presentation of a new rationale"); *Keene Corp. v. International Fidelity Ins. Co.* 736 F.2d. 388, 393 (7th Cir. 1984) (a party cannot raise new legal theories in a motion for reconsideration or on appeal).

NOTES *(Continued)*

> [t]he affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects: . . . [c]reating or increasing any indebtedness . . . [e]ntering into contracts of any kind . . . where the amount exceeds $100.00 . . . [f]ailure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

24 Pa. Stat. Ann. §5-508.

Even if Acmat had challenged the "final arbiter provision" in its contracts in a timely fashion, any such challenge would be without merit. Acmat's reliance, for example, upon the case of *John F. Harkins Co. v. School Dist. of Phila.*, 313 Pa. Super. 425, 460 A.2d 260 (1983) is misplaced. Acmat cites *Harkins* for the proposition that it was entitled to offer proof of additional damages even where the School District was the final arbiter of the contractor's net cost. However, Acmat did not submit any proper evidence by affidavit in opposition to the School District's Motion for Summary Judgment to demonstrate its costs exceeded the amount approved by the Board.

Furthermore, Acmat's reading of *Harkins* is incorrect. *Harkins* involved the issue of whether a "total cost" method for evaluating additional work performed under a contract was appropriate. Reversing the trial court's use of the total cost method and its decision in favor of Harkins, the Pennsylvania Superior Court stated "[o]ur independent review of the record persuades us that this was error. In the first place, the School District was to be the final arbiter of the contractor's net costs." 313 Pa. Super. at 434, 460 A.2d at 265. Thus, the final arbiter clause was both enforceable and relied upon by the Superior Court in its decision. Further, the *Harkins* case involved only an evaluation of the "total cost" method. There is nothing in the record here to demonstrate that the School District argued that the final arbiter clause was binding and conclusive with respect to its determination of damage.

Finally, the District Court and the United States Court of Appeals for the Third Circuit are not bound by decisions of the Pennsylvania Superior Court in interpreting Pennsylvania law. *Goodwin v. Elkins & Co.*, 730 F.2d 99 (3d Cir. 1984), *cert. denied*, 105 S.Ct. 118 (1984). The only decisions they are bound to follow in interpreting Pennsylvania law are the decisions of the Pennsylvania Supreme Court. *Id.* As explained more fully below, the Pennsylvania Supreme Court has refused to permit contractors to recover against school districts in those instances where base contract work or modifications have not been formally approved in advance by school boards.

In short, Acmat has not been denied any procedural due process rights under the terms of its contracts. Having freely agreed to the provisions in its contracts and having offered absolutely no proper evidence under Rule 56 of the Federal Rules of Civil Procedure at the time the School District filed its Motion for Summary Judgment, that the costs figures determined by the School District (and later approved by the court) were improper, Acmat has absolutely no basis to contend its procedural due process rights have been abridged.

B. The District Court Correctly Interpreted The Contract Documents.

Acmat next argues that the District Court incorrectly interpreted the "differing site conditions" provision in the asbestos-removal contracts between Acmat and the School District. Once again, Acmat is merely asking this Court to serve as the final arbiter of certain contract provisions which are to be interpreted under Pennsylvania law. This issue does not provide even remotely a "special and important" reason for this Court to review this case on a Writ of Certiorari.

Moreover, Acmat's argument is simply incorrect. Acmat's attempt to recover under the differing site conditions clause fails for three reasons. First, the final sentence of Paragraph 14(c) of the contracts provides that any increase or decrease of cost shall be adjusted in the manner provided in the contract for adjustment as to change. (App. E at 91a). This provision clearly relates back to the provision requiring School Board approval for contract modifications. Second, Acmat relies incorrectly upon the case of *Teodori v. Penn Hill School Dist. Auth.*, 413 Pa. 127, 196 A.2d 306 (1964), for the proposition that a differing site condition clause is not modified by a "changes and alterations" clause requiring formal approval of all contract changes. *Teodori* involved a dispute as to whether a "changes and alterations section requiring a written order or differing provisions clause" governed the dispute. *Id.* The case did not involve a provision present in the contracts between Acmat and the School District relating to Board approval of changes to the contract or contract

price. Further, the contract language in *Teodori* is materially different from the contract language in the present case. In *Teodori*, the parties followed the contractually mandated steps. Here, Acmat was required to provide proper notice to the School District of the alleged differing conditions pursuant to Paragraph 14(c). If that had been done, the School District was to investigate, and if it found *materially differing conditions*, it was to make changes in the drawings and/or specifications as it found necessary. Even if Acmat had gotten to the point where change in drawings and specifications was necessary, it required Board approval under Paragraph 14(a). Paragraph 14(a) expressly provides that the School District may, *subject to Board approval*, make changes in the drawings and/or specifications in the contract.

Furthermore, the court in *Teodori* specifically found that the differing conditions included work in the original contract, and no physical changes or alterations in the contract documents were necessary. 413 Pa. at 132-33, 196 A.2d at 309. By contrast, Acmat sought payment in this action for extra work that it contended was not within the provisions of its original contracts.

Third, Acmat cannot recover under the "differing conditions" clause is that it failed to conduct an inspection of the building site prior to submitting its bid to determine the full scope of the work at the project.[6] Acmat expressly agreed in its contract that it was responsible for inspecting the site and acknowledged it would be responsible for all charges and costs resulting from its failure to verify the conditions at the site.

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6. In moving for summary judgment, the School District presented extensive evidence concerning Acmat's failure to inspect the building site before it submitted its bids. The School District, for example, submitted deposition testimony from Acmat's own job foreman that the extent of overspray at the Rush School was readily apparent as soon as Acmat began moving the ceiling tiles on the first floor. The School District also submitted deposition testimony that Acmat typically performs an inspection before submitting its bids for asbestos removal contracts, and that these inspections include removal of ceiling tiles. In response, Acmat merely submitted an affidavit which was not based on personal knowledge and did not include any statement that Acmat was prevented by any action of the School District from making a proper inspection.

(App. E at 88a). Further, each contract provided that Acmat was responsible for ascertaining the nature and location of the working conditions which could affect the work, and that any failure to do so would not relieve Acmat from the "responsibility for successfully performing the work *without additional expense to the School District.*" (*Id.*, emphasis added). Under Pennsylvania law, once a public contractor assumes responsibility for being aware of the conditions it will encounter on the site, its duty cannot be excused simply because its visual inspection was inadequate. *Commw. v. Mitchell's Structural Steel Painting Co.*, 18 Pa. Commw. 591, 336 A.2d 913 (1975).

The Pennsylvania Supreme Court expressly rejected the argument Acmat now makes in *Nether Providence Twp. School Auth. v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984). In *Durkin*, a school authority entered into an agreement with a contractor to construct a new high school for a fixed price. After construction began, the contractor noticed discrepancies between the site plan topography contour lines and the actual topographical conditions. As a result, the contractor was required to clear additional ground at the job site.

Before the job was completed, the parties disputed who would bear the cost of the additional work which had to be performed. Like Acmat, the contractor in *Durkin* was obligated to examine the site, ascertain the nature and location of the work and the general local conditions which would affect the work or cost thereof. *Id.*, at 46, 476 A.2d at 906. The contractor sought to recover for the extra work due to actual site conditions which differed from the contract documents and site plan provided by the School District. The Court denied the claim since the School Board had never approved the extra work.

The District Court here properly rejected Acmat's attempt to impose the cost of differing site conditions on the School District due to Acmat's failure to inspect the building site before it submitted its bids. The District Court stated that Acmat's failure to "ascertain what was entailed in performing the contracted work could not be visited upon the School District but

would be the contractor's responsibility for successfully performing . . . without additional expense to the School District." (App. C at 8a). The court concluded that:

> [t]o permit a contractor to claim belatedly it could not discover the scope of the work through a pre-bid inspection, and without more, to collect for work not approved as an extra, would nullify the contract provisions controlling bidding and performance and undermine the fiscal authority and responsibility of the public contracting body.

(*Id.*). The District Court's reasoning is entirely consistent with the holding and spirit of the Pennsylvania Supreme Court in *Durkin*, which explained, "[w]e have always rigidly imposed strict standards on contractors who deal with public bodies to prevent the unwarranted plundering of public funds. . . ." 505 Pa. at 48-49, 476 A.2d at 907.

Acmat's reliance upon the decisions in *United States v. Spearin*, 248 U.S. 132, 39 S.Ct. 59, 63 L.Ed. 166 (1918) and *United Contractors v. United States*, 368 F.2d 585 (Ct. Cl. 1966) is misplaced. Neither of these cases involves interpretations of Pennsylvania law and its strict requirements concerning Board approval in advance of all contract work or modifications.

C. The District Court Properly Entered Summary Judgment on Acmat's Breach of Contract Claims

The District Court properly granted the School District's summary judgment motion on Acmat's breach of contract claims. Relying upon the Pennsylvania Supreme Court's decision in *Durkin*, the District Court held that Acmat had failed to obtain the necessary approval from the School Board for its claims for alleged extra work, as required under the provisions of the Pennsylvania Public School Code and the provisions of its contracts with the School District. Well *after* the entry of summary judgment on behalf of the School District, Acmat argued for the first time that certain claims were beyond the scope of its contracts with the School District and were, therefore, entitled to adjudication under common law principles. (R.A. 88). Specifically, Acmat contended it had performed

"protest work", which was somehow separately compensible as a breach of contract, the requirement of Board approval notwithstanding. This issue was raised for the first time by Acmat in its untimely motion for reargument.[7] As the School District has pointed out, Acmat was not permitted to raise these claims belatedly in an effort to set aside the entry of summary judgment. Further, Acmat is prohibited from recovering for "protest work" because it continued to perform its contract without obtaining School Board approval. *See Dick Corp. v. State Public School Bldg. Auth.*, 27 Pa. Commw. 498, 365 A.2d 663 (1976) (rather than proceeding with extra work without written authorization, contractor may refuse to perform it until it receives the contractually required written authorization).

D. The District Court Did Not Decide Improperly Disputed Issues of Material Fact.

Acmat takes issue with various legal and factual findings by the District Court at the time it ruled upon the School District's Motion for Summary Judgment. Acmat believes, for example, that the District Court should have characterized certain work as base contract work rather than extra work. Acmat also believes there were disputed issues of fact as to whether or not Acmat conducted a reasonable pre-bid site inspection.

Once again, these efforts to reargue the evidence do not even remotely qualify as "special and important reasons" to require the issuance of a Writ of Certiorari. Furthermore, Acmat is simply incorrect. Acmat does not point to even a *single* example of how the District Court improperly determined that certain work was base contract work, as opposed to "extra work." Acmat's second argument, that there were disputed issues of material fact as to the adequacy of Acmat's pre-bid inspection, is equally unfounded. As the School District has previously pointed out, Acmat failed to submit *any* proper evidence when the District Court decided the Motion for Summary Judgment

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7. Local Rule 20(g) of the Rules of the United States District Court for the Eastern District of Pennsylvania requires that a motion for reargument or reconsideration be filed within ten days of the order or decree concerned.

to establish it conducted an adequate pre-bid inspection. It was not until many months *after* the Motion for Summary Judgment was decided that Acmat, in its motion for reargument, attempted to submit evidence for the first time concerning the adequacy of its pre-bid inspection. This evidence was properly disregarded by the District Court, since it could and should have been submitted by Acmat at the time it opposed the School District's original Motion for Summary Judgment.

In short, Acmat's arguments concerning disputed issues of material fact provide no compelling basis for a Writ of Certiorari and, furthermore, were never properly before the District Court.

E. The District Court Properly Dismissed Acmat's Claims for Delay Damages.

Acmat agreed in each of its contracts with the School District that it would not seek to recover damages if it were delayed in concluding its work under the three asbestos removal contracts.[8] This clause prohibits Acmat from seeking damages from the School District even if it was delayed by acts of the employees or agents of the School District. This is merely one more instance where Acmat is asking this Court to interpret contractual issues under Pennsylvania law.

Contract provisions which prohibit damages for delay are "now universally accepted as valid." *F.D. Rich Co. v. Wilmington Housing Authority,* 392 F.2d 841, 843 (3d Cir. 1968). Acmat, however, now claims the School District caused delays by

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8. Each of Acmat's agreements with the School District contains the following delay damages provision:

> If any contractor shall be delayed in completion of his work by reason of unforeseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God, acts of neglect . . . of any other contractor . . . the period herein-above specified for completion of his work may be extended by such time as shall be fixed by the School District, but *the contractor shall not be entitled to any damage or compensation from the School District on account of any delay* or delays resulting from any of the aforesaid causes. (App. E at 92a, emphasis added).

interfering with the prosecution of its work. This is simply another instance where Acmat is now making a conclusory argument which was not properly supported by affidavit or other competent evidence at the time the District Court decided the School District's motion. Acmat presented no competent evidence to suggest, much less prove, that the School District had deliberately delayed Acmat in the prosecution of its work. Under the circumstances, the District Court properly entered judgment in favor of the School District on Acmat's claim for delay damages.

F. Based Upon The Jurors' Answers To Special Interrogatories, The District Court Properly Entered Judgment For The School District On Acmat's Claim For Contract Retainages.

The School District retained contract balances from Acmat because Acmat failed to provide copies of dump tickets evidencing the proper disposal of asbestos-contaminated materials. The contracts between Acmat and the School District provided in no less than three different sections that Acmat had to dispose of asbestos-contaminated materials removed from the schools in an approved landfill certified to receive hazardous waste, obtain signed dump tickets from the landfill and submit the dump tickets with its final payment requisition.

The School District produced overwhelming evidence at the counterclaim trial that the dump tickets had not been provided to it by Acmat. The jurors, by answers to special interrogatories, concluded that Acmat did not prove that it supplied to the School District all the asbestos site dump tickets in compliance with the contract specifications and conditions. The District Court, therefore, entered judgment against Acmat and in favor of the School District on Acmat's claim for the contract balances.

Acmat now contends that the District Court erred by not instructing the jury that the failure to provide dump tickets was an immaterial breach of the contracts. This argument is without merit for several reasons. First, it is self-evident that proof of

proper disposal of hazardous waste material is not an "immaterial" issue. The multiple requirements in the contract requiring dump tickets confirm as much. Second, Acmat never argued to the jury that the failure to provide dump tickets was an "immaterial breach" of the contracts. Third, Acmat never requested a point for charge instructing the jury that the failure to provide dump tickets was an immaterial breach.[9] For all these reasons, the District Court properly entered judgment for the School District on Acmat's claim for contract retainages.

G. The District Court Properly Dismissed Acmat's *Quantum Meruit* Claims.

Acmat's argument that its self-styled, quasi-contractual claims did not require prior Board approval under the Pennsylvania School Code is simply incorrect as a matter of law. Quite obviously, if these claims were permitted to stand, the requirement that approval must be obtained in advance of the expenditure of public funds would be rendered meaningless. The Pennsylvania courts, therefore, have consistently rejected quasi-contractual claims when the requirements of a public statute have not been satisfied. *See Commw. v. Seagram's Distiller's Corp.*, 379 Pa. 411, 109 A.2d 184 (1954) (rejecting contractor's *quantum meruit* claim where contractor failed to comply with statutory requirements); *Appeal of Sykesville Boro.*, 91 Pa. Super. 335 (1927) (rejecting contractor's quasi-contractual claims against school district where required approval was not obtained).

The decision in *Derry Twp. School Dist. v. Suburban Roofing Co.*, 102 Pa. Commonw. 54, 517 A.2d 225 (1986) does not relieve Acmat of its obligation to obtain prior Board approval. Acmat seeks to recover for extra work, for which it never obtained Board approval. *Derry* did not involve a claim for extra work. The expansive reading of *Derry* advanced by Acmat would

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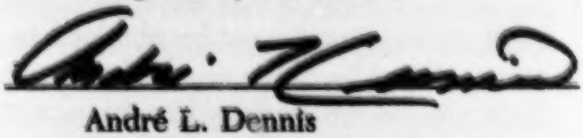
9. Not surprisingly, Acmat did not include its points for charge in either its appendix to its Appeal to the United States Court of Appeals for the Third Circuit or its appendix to its Petition for a Writ of Certiorari.

make *Derry* wholly inconsistent with the decision of the Pennsylvania Supreme Court in *Durkin, supra*, since many claims for extra work invariably involve a dispute between the contractor and the owner over each party's responsibilities under the contract. Under Acmat's approach, the contractor would merely have to show it disagreed with an owner's interpretation that certain work was required under a provision of the contract. Any such holding would abrogate the protections afforded by §5-508 of the School Code. The District Court properly concluded that *Derry* did not apply to the facts of this case.[10]

CONCLUSION

For all of the foregoing reasons, it is respectfully requested that Acmat Corporation's Petition for a Writ of Certiorari be denied.

Respectfully submitted,



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Dated: October 22, 1990

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10. In fact, the Commonwealth Court in *Derry* reaffirmed that *Durkin* prohibited a contractor from recovering compensation for extra work performed under a change order which was never approved by the School Board in accordance with contract requirements.

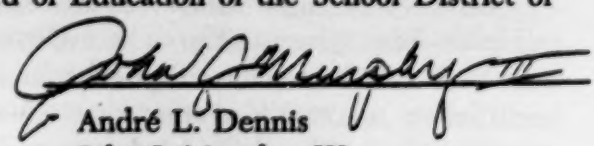
RESPONDENT'S APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA	:	
Defendant	:	No. 85-7067

MOTION FOR SUMMARY JUDGMENT OF THE SCHOOL DISTRICT OF PHILADELPHIA

The School District of Philadelphia hereby moves the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for the entry of judgment on its behalf with respect to each and every claim asserted by Acmat Corporation in its Amended Complaint. The School District of Philadelphia is entitled to the entry of judgment on its behalf because there is no genuine issue as to any material fact and because the School District is entitled to judgment as a matter of law under the provisions of the Pennsylvania Public School Code and under the provisions of its contracts with Acmat Corporation. The School District relies upon the memorandum of law which accompanies this motion as well as the attached Affidavit of Herman Mattleman, Esquire, President of the Board of Education of the School District of Philadelphia.



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MEMORANDUM OF LAW OF THE SCHOOL DISTRICT OF PHILADELPHIA IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA	:	
Defendant	:	NO. 85-7067

MEMORANDUM OF LAW OF THE SCHOOL DISTRICT OF PHILADELPHIA IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Acmat Corporation ("Acmat") has filed claims against the School District of Philadelphia (the "School District") seeking additional compensation under three separate written agreements for the removal of asbestos at Fairhill Elementary School, Lincoln Senior High School and Rush Middle School in Philadelphia, Pennsylvania. The School District not only denies that Acmat is entitled to any additional compensation but insists it is entitled to substantial credits for work Acmat did not have to perform under the three agreements. In addition, the School District has asserted a counterclaim against Acmat and seeks in excess of $400,000 due to Acmat's failure to complete the contracts within the time required in the agreements and to complete all labor and provide all materials called for in each of the agreements.

The School District now moves for summary judgment on its behalf pursuant to Rule 56 of the Federal Rules of Civil Procedure because there is no genuine issue as to any material fact and because the School District is entitled to judgment in its

favor as a matter of law under the terms of its contracts with Acmat and the provisions of the Pennsylvania Public School Code.

The terms of Acmat's three contracts with the School District are not in dispute.[1] The first of the three contracts is B-137 ("Fairhill Contract") under date of April 16, 1984 for the fixed price of $446,000. (Exhibit No. 1) The School District, with School Board approval, and Acmat subsequently agreed on June 26, 1984 to a price change on the Fairhill Contract in the amount of $18,000 and a change in specifications known as the "Work Practices Supplement". (Exhibit No. 2). The School District agreed to no other change in price on the Fairhill Contract. (Mattleman Aff. at ¶¶3-4).

The second contract is B-163 ("Lincoln Contract") under date of June 11, 1984, in the fixed amount of $223,000. (Exhibit No. 3) The provisions in the Work Practices Supplement were a part of the specifications for the Lincoln Contract. No change order was issued by the School District with respect to this contract. *Id.*

The third contract is B-216 ("Rush Contract") under date of June 11, 1984, relating to the second floor of the Rush School in the fixed amount of $595,000. (Exhibit No. 4) Provisions of the Work Practices Supplement were also part of the specifications for the Rush Contract. Under date of October 30, 1984, the School District and Acmat entered into a Supplemental Agreement B-43 to the Rush Contract. (Exhibit No. 5) The Supplemental Agreement, with School Board approval, added the first floor of the Rush School to Acmat's contract for an additional $656,000. On April 29, 1985, the School District, with School Board approval, and Acmat agreed to Change Order No. 1 in the amount of $63,282.89 for extra labor, material and equipment necessary to wet wipe items in closets and cabinets required because of the presence of asbestos. (Exhibit No. 6) No other

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1. Copies of each contract, supplemental agreement and change order have been separately bound and submitted to this Court previously as Exhibits of the School District's Response to the Statement of Claim of Acmat Pursuant to Order of April 23, 1986. The exhibit numbers used in this memorandum conform to the exhibit numbers in that submission.

change order was issued by the School District with respect to this contract. (Mattleman Aff. at ¶__).

Acmat agreed in each of these contracts with the School District that it would be solely responsible for "ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof." (Fairhill Contract, General Conditions at ¶9(a); Lincoln Contract, General Conditions at ¶7(a); Rush Contract, General Conditions at ¶7(a)). Acmat further acknowledged that any failure on its part to ascertain the effect of its work under the contracts would not relieve it from "responsibility for successfully performing the work *without additional expense to the School District.*" *Id.* (Emphasis added).

Acmat further agreed it would not be entitled to recover delay damages from the School District under any circumstances, including those instances where such delays are caused by acts or neglect of the School District. (Fairhill Contract, General Conditions at ¶17(c); Lincoln Contract, General Conditions at ¶15(c); Rush Contract, General Conditions at ¶15(c)).

The asbestos removal contracts further provide that the School District may, *subject to the approval of the School Board,* make changes in the contracts. Each of the agreements, however, expressly cautions that verbal instructions given by any officer, agent or employee of the Board which depart from the contract documents shall not be binding upon the Board. (Fairhill Contract, General Conditions at ¶16; Lincoln Contract, General Conditions at ¶14; Rush Contract, General Conditions at ¶14).

The total fixed price for all three contracts was $2,001,283.00. Acmat, however, now seeks somewhere between $5 Million and $6 Million in damages from the School District for alleged contract extras and modifications.[2]

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2. Even at this late stage in the litigation, the precise amount of Acmat's claimed damages is unknown. Acmat has yet to provide either the School District or the Court with a final calculation of the damages it claims it incurred in connection with its work at the three schools. Acmat has attached to its pretrial memorandum a portion of a report by Kellogg Corporation which purports to set forth a "preliminary estimate of damages" incurred by Acmat on

The School District relies upon seven basic legal grounds in support of this motion:

(1) All of Acmat's claims for additional work must be rejected since Acmat failed to obtain the approval of the School Board for this alleged extra work as required under its contracts with the School District and under the provisions of the Pennsylvania Public School Code;

(2) Acmat's contracts with the School District and the case law provide that verbal requests by School District representatives shall not be binding upon the Board.

(3) Acmat is prohibited from recovering against the School District under any quasi-contractual theory of recovery since it has failed to comply with the provisions of the Pennsylvania School Code and its contracts with the School District;

(4) Acmat's fraud claim against the School District must be dismissed as a matter of law since Acmat is attempting to superimpose a tort theory on what is essentially a contractual cause of action and because Acmat has failed to establish that it reasonably relied upon any alleged misrepresentations by representatives of the School District;

(5) Acmat is precluded from seeking to recover delay damages against the School District under the terms of its contracts even in those instances where such delays may be attributable to acts or neglect on the part of the School District;

The School District of Philadelphia is a separate and independent School District administered, operated and managed by the Board of Education in accordance with state and local laws. The Pennsylvania Public School Code of 1949

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the three projects in the amount of $5,387,670. Following the submission of this motion, the School District will seek a conference with the Court or will file a motion seeking to compel Acmat to respond to the School District's discovery requests and provide it with a final accounting of the damages it claims it is entitled to under the three contracts.

provides, in pertinent part, that: "[t]he affirmative vote of a majority of all the members of the Board of School Directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects":

> . . . Entering into contracts of any kind, including contracts for the purchase of fuel or any supplies, where the amount involved exceeds One Hundred Dollars ($100.00) . . . . Failure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

24 Pa. Stat. Ann. §5-508. Each of Acmat's contracts with the School District provide that they are entered into subject to the provisions of the Pennsylvania School Code of 1949.

The plaintiff bears the burden of establishing both the validity of the underlying contract as well as approval of the contract by a majority of Board members. *Rudolph v. Albert Gallatin School District*, 60 Pa. Commw. 456, 431 A.2d 1171 (1981). Without a proper resolution, an action against the School District is precluded.

The Pennsylvania courts have insisted that contractors comply with the requirements of the School Code. In *Framlau, supra.*, the Court declined to enforce settlement terms agreed to by the president of the Philadelphia School Board and its attorney because the School Board declined to approve the Agreement as required under Section 5-508 of the School Code. Despite the apparent harshness of the result, the Court reasoned:

> One who contracts with the School District must, at his own peril, know the extent of the power of the School District's officers in making the contract . . . [and] know that the Board of Directors may repudiate any contract provision to which it is assented. . . It is the general rule that where formal action is necessary to bind the School District, such a requirement must be met in order to predicate liability. In the absence of a compliance with the applicable statutory

> provisions pertaining to the motive by which a board of school directors may make a contract, no enforceable contract will result.

Id. at 627-28.

Modifications to a school district contract likewise require approval by a majority of Board members. *Matevish v. Ramey Borough School District*, 167 Pa. Super. 313, 74 A.2d 797 (1950). In *Matevish*, the Court rejected a claim by a transportation company that the secretary of a School Board had orally modified the requirements of a contract for the busing of students. The Court concluded that modification of the contract required the approval of the School Board in compliance with the same Public School Code provisions which applied to the formation of the original contract. Absent compliance with the provisions of the School Code, the Court concluded that no liability could be imposed upon the School District for any alleged modifications to the contract.

2. Contract Requirements.

Acmat's contracts with the School District, like the School Code, provide that any modifications to the contract *must* be approved by the School Board:

> [t]he School District may, . . . , *subject to approval of the Board* . . . make changes in the drawings and/or specifications of this contract if within its general scope, such changes to be made in writing. If such changes cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in the contract price being *subject to the approval of the Board.*

General Condition ¶16(a) (emphasis added). Each contract also expressly cautions that "[v]erbal instruction given by any of the officers, agents, or employees of the Board which depart from the contract document shall not be binding upon the Board. General Condition ¶16(d). Thus, Acmat clearly agreed that: (1)

any modifications to the contract were required to be in writing; (2) any modifications were subject to the approval of the Board; (3) any change in the contract price was subject to the approval of the Board; and (4) verbal instructions which departed from the contract document were not binding upon the Board.

It is well recognized under Pennsylvania Law that strict compliance with the contractual provisions in a public service contract is necessary to support a claim under a contract for extra work or material. *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984). In *Nether Providence*, a School Authority entered into an agreement with a contractor to construct a new high school for the Authority for a fixed price. After construction began, the contractor noticed discrepancies between the site plan topography contour lines and the actual topographical conditions. As a result, the contractor was required to clear additional ground at the job site.

Before the job was completed, the parties disputed who would bear the cost of the additional work which had to be performed. The School Authority's President authorized the School Authority's secretary to write to the contractor to acknowledge the dispute and recommend that the contractor continue the work with resolution of the disagreement at a later time. After the job was completed, the contractor submitted a claim to the School Authority for the extra work claiming that he had been induced to perform the work by the letter authorized by the School Authority's President. When the School Authority rejected the contractor's claim, the contractor brought an action against the School Authority seeking compensation for the extra work.

Recognizing the long line of Pennsylvania cases requiring strict adherence to the provisions of public contracts, the Pennsylvania Supreme Court rejected these claims for additional compensation. The Court noted that the contract obligated the contractor to determine the amount of cut and fill needed to complete the job and to inspect the work site in order to verify conditions and assess the work which was required to be performed. The contract also provided that "no change in the

contract shall be made without the written approval of the Board." The Court, therefore, declined to allow the contractor to recover since written approval of the Board was never obtained. In so concluding, the Court stated:

> [w]e have always rigidly imposed strict standards on contractors who deal with public bodies to prevent the unwarranted plundering of public funds, to uphold the integrity of the bidding process, and we see no reason to change our long-established precedents today. We reiterate that public agreements can be altered only by the same formal municipal action that created them or express ratification by resolution of the public body.

The Court in *Nether Providence* rejected the contractor's claim that the School Authority had waived the requirement that changes to the contract needed the approval of the Board. The Court held that a provision in a public contract relating to the manner in which changes to the contract can be made can be waived *only* by formal written action of the Board or by express ratification of the extra work by resolution of the Board. The Court, therefore, held that a letter prepared by the School District's president and secretary was not the act of the full board and that the formal written action requirement for waiver was not satisfied. The Court also observed that the Board had never adopted a resolution ratifying the extra work.

The Supreme Court's decision in *Nether Providence* is consistent with a long line of Pennsylvania cases which require strict compliance with contractual provisions regarding extra work in public contracts. In *Morgan v. Johnstown*, 306 Pa. 456, 160 A.696 (1931), written orders for the city engineer for alleged extra work were required by the terms of the contract. The Court held that, in the absence of a written order from the city engineer, the contractor could not recover for alleged extra work. Similarly, in *Montgomery v. Philadelphia*, 391 Pa. 607, 139 A.2d 347 (1958) the contract required the contractor to obtain a written order from the city engineer before proceeding with extra work. The Court refused to allow any recovery for additional work absent the required approval and explained that

authorization by a subordinate of the designated official would not constitute a waiver of he requirement of specific written authorization. *Dick Corp. v. State Public School Building Authority*, 27 Pa. Commw. 498 (1976) (rather than proceeding with extra work without written authorization, a contractor may refuse to perform until it receives the contractually required written authorization); *Commonwealth Department of Transportation v. Burrell Construction Supply Co.*, 483 A.2d 589 (Pa. Commw. 1984) (contractor could not recover for extra work in the absence of contractually required written authorization); *Commonwealth Department of Transportation v. Anjo Construction Co.*, 87 Pa. Commw. 310, 487 A.2d 455 (1985) (written orders for extra work required by the terms of municipal contract are a necessary predicate to recovery for extra work).

Nether Providence and its progeny require the entry of summary judgment on behalf of the School District. The contracts between Acmat and the School District provide in no uncertain terms that changes to the contract must be made in writing and approved by the Board. Any changes to the contract price were also subject to the approval of the Board. Other than the two occasions when the Board approved certain additional work, Acmat cannot point to a single instance where the School Board approved the changes to the contracts for which Acmat now seeks to recover.[4] Having agreed to these provisions, Acmat has no basis to pursue its claims for additional compensation.

B. Oral or Written Directives of School District Representatives Do Not Constitute School Board Approval.

Having failed to obtain formal Board approval, Acmat nonetheless suggests it is entitled to recover against the School District because, it contends, various representatives of the School District directed it, orally or in writing, to perform alleged extra work. There are three fundamental problems with

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4. Nor can Acmat point to a single instance where the School Board, by formal resolution, waived adherence to the provision in its contracts requiring formal Board approval.

this argument which have already been discussed at some length above: (1) The School Code requires formal Board approval of any contracts or modifications to contracts; (2) Acmat's contracts with the School District provide that all modifications to the contract must be approved by the School Board; and (3) Acmat's contracts further provide that any verbal instructions by representatives of the School District shall not be binding upon the Board.

The Pennsylvania Courts have consistently rejected efforts by contractors to circumvent the statutory or contractual requirements on the basis of alleged oral or written directives. In *Morgan v. Johnstown*, 306 Pa. 456, 160 A.696 (1931), the Court held a contractor could not recover for extra work on the basis that members of City Council had orally directed extra work be done when the contract required a written order of the city engineer. Similarly, in *Montgomery v. Philadelphia*, 391 Pa. 591, 139 A.2d 347 (1958), the Court held that when written orders of the city engineer for extra work were required, the contractor could not recover on the basis of authorization by subordinates of the city engineer. Authorization for extra work must be made in strict compliance with the contract provisions or the contractor is barred from pursuing claims for additional work.

Individuals who contract with public bodies governed by public statutes make agreements outside the parameters of the statute at their own risk. *Commonwealth v. Seagram Distillers Corp.*, 379 Pa 411, 109 A.2d 184 (1954). The Court in *Seagram* refused to enforce an oral agreement between *Seagram* and the Board. The Board was required by statute to approve any such contracts. The Court stated that it was the obligation of Seagram to determine the extent of the authority of the Director of Operations to bind the Board by an oral agreement since "[p]ersons contracting with a governmental agency must, at their peril, know the extent of the power of its officers making the contract." *Id.* at 417, 109 A.2d at 186. The Court held that Seagram's oral agreement with the Board's subordinates did not constitute formal action by the Board and was, therefore, invalid. See also *Vona v. Redevelopment Authority of Delaware*

County, 109 Pa. Commw. 156, 530 A.2d 1018 (1987) (Plaintiff acted at his peril when he performed additional work on the basis of representations made by the Authority's counsel because counsel lacked proper authorization to enter into the agreement).

C. Acmat Is Prohibited From Recovering Against The School District Under Any Quasi-Contracrural Theory Of Recovery.

In addition to its contract claims, Acmat has asserted various quasi-contractual theories in its Amended Complaint. Count VI sets forth a theory based upon *quantum meruit*, Count VII sets forth a claim for unjust enrichment and Count XI sets forth a claim based upon promissory estoppel.

By asserting these equitable claims, Acmat seeks to render the requirement of Board approval in the School Code meaningless and circumvent the requirements of its asbestos removal contracts. The Pennsylvania courts have consistently rejected quasi-contractual claims when the requirements of a public statute have not been satisfied. In *Commonwealth v. Seagrams Distillers Corp.*, *supra.*, the Court refused to permit *Seagrams* to recover on a theory of *quantum meruit* or quasi-contract because the Board had accepted all the benefits of the oral contract. The Pennsylvania Supreme Court held that since official action of the Board was required by statute, in the absence of compliance with the statutory provisions, there could be no quasi-contractual recovery. The Court further held that "the doctrine of quasi-contract does not extend to benefits which by there very nature cannot be surrendered, and the retention of which is therefore involuntary." *Id.* at 419, 109 A.2d at 187. The Court observed that where benefits conferred upon a public body pursuant to an invalid contract, by their very nature, cannot be surrendered, no implied obligation arises on the part of the municipality to make compensatory payment. As a result, Seagrams could not recover under any quasi-contractual theory of recovery.

These principles are equally applicable to public school districts. In *In re Appeal of Sykesville Borough*, 91 Pa. Super. 335 (1927), recovery on the theory of *quantum meruit* against the School District for improvements to a school building was denied. The statutory prerequisite of a majority vote of the Board was absent and the court concluded that the School Board was incapable of making agreements to pay on the rule of *quantum meruit* since all decisions regarding contracts must be made in accordance with the statutory mandate. Although the results of this rule may be harsh, to conclude otherwise, would produce the untenable result that school districts could become liable without all of the protections provided by the Public School Code. *See also Price v. Taylor Borough School District*, 157 Pa. Super. 188, 42 A.2d 99 (1945) (In the absence of compliance with the statutory requirements, a party contracting with the School District can have no recovery even on a theory of *quantum meruit*, for the statute excludes all equities and implied liabilities); *Newhard v. North Union Township School District*, 170 Pa. Super. 477, 87 A.2d 98 (1952) (Unless statutory provisions are observed there could be no enforceable contract entered into by a school board nor can a plaintiff recover on the basis of *quantum meruit*).

Furthermore, a party may not recover on a quasi-contractual theory against municipal authorities if that party fails to comply with contractual provisions governing modifications to the contract or extra work. In *Montgomery v. Philadelphia*, the Court explained the rationale for this rule as follows:

> Where a contractor has attempted to recover for either additional work or work necessitated by a change in the plans and specifications, all of the cases in this jurisdiction have denied recovery where the contract prescribed a procedure for the prior approval of such additional work, and such prescribed procedure has not been followed. The reasons for the requirement of strict adherence to the contractual provisions are obvious. Municipal construction contracts, whose terms are in a large part governed by statute, are designed to provide, from the initial bidding to

> final completion, for as many reasonably foreseeable contingencies as practicable, to forestall any possible collusion between city officials and contractors and to protect public funds against wanton dissipation.

391 Pa. at 616, 139 A.2d at 350. The court in *Montgomery*, accordingly, denied any recovery, contractual or otherwise by the part of the contractor.

Acmat's *quantum meruit* theory is clearly barred because Acmat failed to proceed in accordance with the requirements of the School Code on its contracts with the School District. Likewise, Acmat's claim for unjust enrichment is barred since it would void the statutory and contractual requirement of Board approval and would permit "contractual" relationships outside of the statutory protection provided by the Public School Code. Acmat's claim for unjust enrichment is also barred since any "benefit" conferred on the School District, by its very nature, cannot be surrendered, is not voluntarily retained and does not give rise to an implied obligation on the part of the School District to make compensatory payment.

Finally, Acmat's claim for Promissory Estoppel is based upon allegations that the School District promised to compensate Acmat for services rendered and materials supplied. As emphasized repeatedly above, modifications to the contract *must* be approved by the School Board under the terms of the contract and pursuant to the Pennsylvania Public School Code. Acmat agreed that its contracts with the School District would be subject to the provisions of the School Code and further agreed that any verbal directions by representatives of the School District would not be binding upon the Board. The School Board never approved the alleged modifications to the contract and this provision was never waived by the Board. Therefore, the School District is entitled, as a matter of law, to summary judgment in its favor on these claims.

D. Acmat May Not Recover Against the School District on a Theory of Equitable Estoppel.

The provisions of the School Code and its contracts notwithstanding, Acmat suggests it may recover against the School District in the absence of School Board approval under a theory of equitable estoppel. Acmat directs the Court's attention to the case of *Derry Township School District v. Suburban Roofing Co., Inc.*, 102 Pa. Commw. 54, 517 A.2d 225 (1986). Acmat's reliance upon *Derry* is misplaced. If anything, *Derry* merely re-affirms the commitment to the principle that a contractor cannot recover for alleged extra work absent compliance with the School Code and contractual requirements.

The School District in *Derry* awarded a contract to defendant to replace the roof on the School District's high school. The contract required the contractor to replace concrete planks on a unit price basis. The School District's inspector was to make the determination as to which planks had to be replaced. Initially, the School District's inspector determined that approximately 400 planks needed to be replaced and the contractor ordered sufficient replacement planks. However, a new school district inspector subsequently determined that a number of the planks did not have to be replaced thereby leaving the contractor with an excess supply of custom-made planks which were useful only to the School District on its high school. The contractor sought to recover against the School District for its out-of-pocket costs for the unused planks.

The Commonwealth Court in *Derry* re-affirmed that the Pennsylvania Supreme Court's decision in *Nether Providence* prohibited a contractor from recovering compensation for extra work performed under a change order which was never approved by the School Board in accordance with contract requirements. The court in *Derry*, however, noted that the builder was not seeking to recover for the increased costs of *extra* work due to a school district's oral changes to the contract. Rather, the court emphasized that the builder was claiming compensation for its reasonable costs "incurred in reliance upon the District's interpretation of the Contractor's performance under the terms

of the contract, which interpretation the District later altered to the Contractor's detriment." 517 A.2d at 229.

The *Derry* decision has no application to the facts in this case. Acmat was required under each of its contracts with the School District to remove asbestos from three Philadelphia public schools. Like the plaintiff in *Nether Providence,* Acmat now seeks to recover for extra work for which it never obtained board approval. This is not a case where the School District initially interpreted the contracts one way and later another and where Acmat had to "special order" materials which would be useless to Acmat if the School District later determined that less work and materials would be involved. *Nether Providence* remains the law in Pennsylvania and Acmat's claims are, therefore, barred due to its failure to obtain proper board approval for work it now claims is extra to its contracts.

E. Acmat Cannot Recover on a Fraud Theory Against the School District.

Acmat purports to state a fraud claim against the School District in Count VIII of the Amended Complaint. Acmat alleges, *inter alia,* (1) that the School District asked Acmat to perform various modifications and work not called for in its original contracts (Amended Complaint at ¶43), (2) that the School District represented to Acmat that it would be paid for this alleged extra work (*Id.* at ¶51), (3) that the School District made these representations notwithstanding its belief that it was not required to compensate Acmat for this work absent express approval from the School Board (*Id.* at ¶44), (4) that the School District, therefore, never had any intention to pay Acmat for this alleged extra work (*Id.* at ¶45), and (5) that Acmat justifiably relied upon these alleged misrepresentations to its detriment. (*Id.* at ¶53.)

There are at least two major deficiencies in Acmat's fraud claim, each of which requires its dismissal as a matter of law. First and foremost, Acmat's fraud count is nothing more than a thinly veiled attempt to recast contract claims as an action for fraud. A similar attempt to superimpose a tort theory of recovery

on what is essentially a contractual claim was rejected in the case of *Iron Mountain Security Storage Corp. v. American Specially Foods, Inc.*, 457 F. Supp. 1158 (E.D.Pa. 1978).

The Court in *Iron Mountain* stated the distinction between tort and contract as follows:

> Tort actions lie for breaches of duties imposed by law as a matter of social policy while contract actions lie for only breaches of duties imposed by mutual consentual agreements between particular individuals. in tort actions, damages are awarded to compensate the plaintiff for all loss suffered by breach of the duty, whereas in contract actions, damages are limited by the scope of the agreement it must be forseeable at the time the agreement is made. If a tort-feasor breaches a duty imposed by society, a monetary levy beyond that which is compensatory may be imposed against him to punish the wrongdoing and serve as a deterrent. Such punitive damages are not assessed for breach of mere contractual duties, however.

Id. at 1165.

The Pennsylvania Supreme Court has also stated that to permit tort claims for garden variety breaches of contract actions "would erode the usual rules of contractual recovery and inject confusion into our well-settled forms of actions. Most courts have been cautious about permitting tort recovery for contractual breaches and we are in full accord with its policy." *Glazer v. Chandler*, 414 Pa. 304, 308-09 (1964).

This principle was also recognized in the case of *Argo Welded Products, Inc. v. J.T. Reyerson Steel & Sons, Inc.*, 528 F. Supp. 583 (E.D.Pa. 1981). The plaintiff in Argo brought suit against the defendants for providing steel which failed to meet specifications set forth in plaintiff's purchase order. The plaintiff pleaded separate counts under tort and contractual theories. The court concluded that, under Pennsylvania law, the plaintiff's tort count was insufficient. The court reasoned that any duties which may have been breached as to the plaintiff were purely contractual in nature. Tort recovery is permissible, however, solely as recompense for breaches of social obligations. Since any

duty which may have breached extended only to the plaintiff, the court held that the plaintiff could not recover for negligence.

Similarly, in this case, if there has been any breach of obligation, it would be an obligation solely to Acmat and such a breach would be purely contractual in nature. Any duties which allegedly have been breached in this case were imposed solely by a mutual agreement between the School District and Acmat. Plaintiff's claim is contractual in nature and does not involve the breach of duty imposed as a matter of social policy for which an action in tort would lie. The genesis of this matter is the underlying contracts and Acmat is not permitted to inject fraud claims into a purely contractual dispute.

Furthermore, it is readily apparent as a matter of law that Acmat cannot satisfy the necessary elements to support a fraud claim. In order to recover on a fraud claim against the School District, Acmat must prove (1) that the School District made a misrepresentation to Acmat; (2) that the representation was false; (3) that the misrepresentation was of a material fact; (4) that the School District intended that Acmat rely on the misrepresentation; (5) that Acmat justifiably relied on the misrepresentation; and (6) that Acmat's reliance on the misrepresentation was a substantial factor in bringing about damage to Acmat. *Girard Bank v. John Hankock Mutual Life Ins. Co.*, 524 F. Supp. 884, 894 (E.D.Pa. 1981), *aff'd.*, 688 F.2d 820 (3rd Cir. 1982).

Acmat contends that it justifiably relied upon alleged representations by School District representatives that it would be paid for alleged extra work. If Acmat ever relied upon these alleged misrepresentations, however, such reliance was wholly at odds with the provisions in Acmat's contract which carefully set forth the procedures for the approval of extra work on the projects.

As the School District has already pointed out, Acmat expressly agreed in each of its contracts with the School District that any changes to the contracts by the School District would be subject to approval by the School Board. The contracts further provide that verbal instructions given by any of the officers, agents or employees of the Board which depart from the contract

documents, shall not be binding upon the Board. Finally, each of Acmat's contracts with the School District provide that the contracts are entered into subject to the provisions of the Public School Code of 1949 which provides that a School District may not be held liable for a contractual obligation unless the plaintiff can show that the contract was approved by formal resolution of a majority School Board members.

Given these provisions and the requirements of the Public School Code of which Acmat had actual or constructive knowledge, Acmat can hardly argue that it justifiably relied upon any alleged oral or written representation by representatives of the School District as to whether or not it would be paid for alleged extra work. Acmat was well aware and expressly agreed that any such representations by School District employees or representatives would not be binding upon the Board. The School District, therefore, is entitled to the entry of judgment on its behalf an Count VIII of the Amended Complaint as a matter of law and in accordance with the provisions of its contracts with Acmat.

F. Acmat May Not Recover Delay Damages Under its Contracts with the School District.

Acmat agreed in each of its contracts with the School District that it would not seek to recover damages from the School District if it was delayed for any number of reasons in completing its work under the three asbestos removal contracts. Each of Acmat's agreements with the School District contains the following delay damages provision:

> If any contractor shall be delayed in the completion of his work by reason of unforseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God, acts or neglect of the School District, acts or neglect of any other contractor, fires, floods, epidemics, quarantine, restrictions, strikes, or freight embargoes, the period hereinabove specified for completion of his work may be extended by such time as shall be fixed by the School District, but the contractor shall

not be entitled to any damages or compensation from the School District on account of any delay or delays resulting from any of the aforesaid causes.

(Fairhill Contract at ¶17(c); Lincoln Contract at ¶15(c); Rush Contract at ¶15(c)). This clause prohibits Acmat from seeking damages from the School District even if it is delayed by acts of the employees or agents of the School District.

These contractual provisions notwithstanding, Acmat has asserted multiple claims against the School District in which it now seeks to recover damages for alleged delays it attributes to the School District. These claims which are set forth in Acmat's Statement of Claim which has previously been submitted to the Court, can be summarized as follows:

FAIRHILL SCHOOL

Item 6 – Acmat seeks in excess of $200,000 for alleged delays due to late test reports, disruptions and acceleration in the level of work, failure of the School District's inspectors to timely inspect additional cleaning and recleaning, etc.

Item 7 – Acmat alleges it was delayed in completing its work at the Fairhill School due to a lack of elevator service.

Item 11 – Acmat contends its productivity was reduced and that its work on the Fairhill School was delayed by a requirement of the School District that its employees wear fullface respirators instead of half-face masks.

Item 12 – Acmat seeks to recover the costs it contends it had to pay to its independent air monitoring contractor for being at the Fairhill School longer than Acmat originally scheduled.

Item 13 – Acmat seeks payment for what it characterizes as extended home office overhead and the value of field equipment for a period of two months.

LINCOLN HIGH SCHOOL

Item 4 – Acmat contends it lost productivity because of the alleged failure by the School District's air quality inspectors to conduct inspections on a timely basis.

Item 5 – Acmat claims its work was disrupted by a work stoppage order on or about October 20, 1984.

Item 6 – Once again, Acmat contends its productivity was lowered by a requirement of the School District that its employees wear full-face respirators instead of half-face masks.

Item 8 – Acmat seeks to recover for delays due to alleged delayed test results, disruptions and acceleration in the level work, failure of the School District's inspectors to timely inspect the additional cleaning and recleaning, etc.

Item 11 – Once again, Acmat seeks payment for what it characterizes as extended home office overhead and the value of field equipment for a period of two months.

RUSH SCHOOL

Item 18– Acmat seeks to recover monetary damages for alleged lost productivity and inefficient labor which it claims resulted from lack of heat in the building. Acmat contends loss of heat was caused by the School District's failure to provide heat during the winter months.

Item 32 – Acmat seeks payment for what it characterizes as extended home office overhead and the value of field equipment for a period of ten months.

Each of the foregoing claims represents an effort by Acmat to recover for delays it experienced in completing the three asbestos removal contracts with the School District. The fact that Acmat attributes some of these delays to the School District is of no consequence. Acmat's contracts expressly provide that delay damages shall not be recoverable even in those instances where delays are attributable to the acts or neglect of the School District. The delay damages provisions could not be clearer and

Acmat must be precluded from now seeking to recover damages it freely and unequivocally agreed to forego in its contracts with the School District.

G. The School District is Entitled to Make the Final Determination as to Net Costs of Labor and Materials Under its Contracts with Acmat.

The three asbestos removal contracts between Acmat and the School District each provide that the School District may, subject to approval by the School Board, make changes in the asbestos removal contracts. The agreements further provide that the contractor may, in certain limited circumstances, be compensated on a labor and materials basis in connection with any additional work performed under the contracts. However, in each instance where the contractor performs work on a labor and materials basis, the contracts provide that the School District "will make the final determination as to net costs of labor and materials." (Fairhill Contract at ¶16(b); Lincoln Contract at ¶14(b); Rush Contract at ¶14(b)).

Two requests by Acmat for additional compensation were submitted to the School Board: the first request involved the decontamination of school books, supplies and other materials at the Rush School; the second related to the Work Practices Supplement at the Fairhill School. The School Board considered each of these requests and issued resolutions approving payment of additional compensation to Acmat. Acmat now seeks money damages for these items in an amount which exceeds the amount expressly approved by the School Board. At the Rush School, for example, the Board issued a change order in the amount of $63,282.89 for the decontamination work performed by Acmat. The Board determined this was the reasonable value of the work performed by Acmat after spending in excess of three weeks reviewing Acmat's change order requests. Acmat, however, disagrees with this determination and seeks an additional $65,115.33 payment on this item. (Acmat Statement of Claim, Rush School, Item 1).[5] This portion of Acmat's claim, however,

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5. Acmat also seeks additional compensation in connection with the $18,000 change order it agreed to in connection with the Work Practices

must be rejected since Acmat expressly agreed in each of its contracts with the School District that the School District would be the final arbiter of labor and material costs under the agreements.

H. Acmat is Responsible for the Costs of Removing Asbestos Overspray at the Rush School.

Acmat seeks in excess of $400,000 from the School District because it contends it encountered more asbestos overspray at the Rush School than it originally anticipated when it submitted its bid to the School District. Acmat describes this work as follows in its Statement of Claim:

> This extra work included the scraping and cleaning of fireproofing off of duct work, conduit, pipes, hangers, in areas of the concrete slab that extended over two feet beyond the steel beams. The area of a concrete deck immediately adjacent to the beams normally contains some overspray that results when the steel beam is being sprayed. The cleaning of this area is considered to be part of the contract. However, the cleaning of asbestos containing fireproofing beyond two feet from the steel beam is considered extra because this area should not have had any fireproofing whatsoever.

(Statement of Claim at p. 39). Eugene Lord, who served as Acmat's superintendent at the Rush School, has testified that asbestos overspray typically extends from between twelve to eighteen inches on either side of the structural steel beam. (Lord Dep. at pp. 231-32).[6] Acmat does not contend that it is entitled for reimbursement for the removal of all overspray;

Supplement at the Fairhill School. Acmat, for example, seeks $185,000 for removing carpeting and scraping of carpet glue even though it had agreed in writing this work was included in the $18,000 Work Practices Supplement. Similarly, Acmat seeks to recover because of alleged defective testing procedures although it had expressly agreed to these procedures in the Work Practices Supplement.

6. Relevant portions of Mr. Lord's deposition testimony are attached hereto as Exhibit "A".

rather, it complains that it is entitled to additional compensation because the overspray at the Rush School was even more extensive than originally contemplated.

Although Acmat wishes to impose the cost of removing the overspray on the School District, a close examination of the contract documents reveals that Acmat is solely responsible for this work. Acmat's asbestos removal contract for the Rush School expressly requires the removal of ". . . all asbestos containing spray-on fireproofing materials." (Specifications, Section 2080 ¶¶101C, 3.04B). The contract does not distinguish between asbestos fireproofing sprayed on steel beams and any overspray surrounding those beams. Acmat now complains that at least a portion of the overspray was not shown on drawings provided by the School District. Acmat, however, expressly agreed in its contract with the School District that anything mentioned in either of the drawings or the specifications ". . . shall be of like effect as if shown or mentioned in both. In case of differences between drawings and specifications, the specifications shall govern." (Rush School Specifications at ¶13(a)).

Furthermore, Acmat's contract with the School District expressly required Acmat to conduct an inspection of the building site prior to submitting its bid to determine the full scope of its work at the project. The contract expressly provides:

> **EXAMINATION OF THE SITE**
>
> The Contractor bidding on this work must inspect the sites before submitting the proposal and will be responsible for informing himself fully on all determinable, existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same.

(Rush Contract, Special Conditions, SC-07). Acmat also agreed to the following clause in its contract:

> **CONDITIONS AFFECTING THE WORK**
>
> The Contractor shall be responsible for ascertaining the nature and location of the work and the general and

> local conditions which can affect the work or the costs thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the *work without additional expense to the School District.*

(Rush Contract at ¶7(a)) (emphasis added).

Acmat has no basis to seek to impose the costs of removing overspray on the School District due to its own failure to inspect the building site before it submitted its bids. Eugene Lord has testified that the extent of the overspray on the first floor at the Rush School was readily apparent as soon as Acmat began removing the ceiling tiles on the first floor. (Lord Dep. at pp. 229-30). Lord further testified that Acmat typically performs a thorough inspection before submitting its bids for asbestos removal contracts and that these inspections include the removal of ceiling tiles in order to look above the ceiling line. (Lord Dep. at p. 226). If Eugene Lord was able to discover the extent of the overspray on the first floor at the Rush School as soon as ceiling tiles were removed, there is absolutely no reason Acmat could not have discovered the same conditions had it taken these same steps prior to submitting its bid for the Rush School.

The Pennsylvania Supreme Court's decision in *Nether Providence* controls Acmat's overspray claim. The contractor in *Nether Providence* was also obligated to examine the site, ascertain the nature and location of the work and the general and local conditions which could affect the work or costs thereof. *Nether Providence*, 505 Pa. 42, 476 A.2d 904. The contractors sought to recover for extra work due to actual site conditions which differed from the contract documents and site plan provided by the School District. The Court rejected the claim since the School Board had never approved the extra work.[7] Acmat's obligations under the Rush Contract were identical.

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7. Similarly, Acmat's claim for breach of warranty in Count V is barred by the *Nether Providence* decision. If Acmat performed extra work as a result of inaccurate plans and specifications, without School Board approval, Acmat may not recover.

Acmat has absolutely no legal or contractual basis to pass these costs on the School District and judgment should, accordingly, be entered for the School District with respect to Acmat's overspray claim at the Rush School.

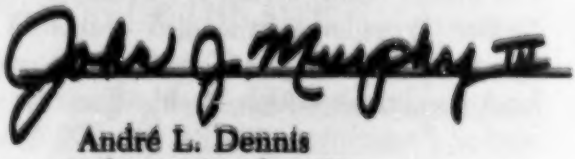
III. CONCLUSION

The terms of the agreements entered into by Acmat and the School District are clear and unambiguous. The intent of the parties is expressed in the written agreements and should be enforced according to the terms of those agreements. The contract documents clearly provide that modification to the contracts and changes in the contract prices were, at all times, subject to Board approval.

Apart from the contract documents, controlling Pennsylvania decisions prohibit each of Acmat's claims in the absence of approval by the Board. Every Count of Acmat's Amended Complaint relates to extra work performed without Board sanction.

For all of the foregoing reasons, Defendant School District of Philadelphia respectfully requests that summary judgment be entered in its favor and against Plaintiff Acmat Corporation on each Count of Acmat's Amended Complaint.

Respectfully submitted,



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Attorneys for Defendant
The School District of Philadelphia

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
THE SCHOOL DISTRICT OF PHILADELPHIA	:	
	:	
Defendant	:	NO. 85-7067

AFFIDAVIT

COMMONWEALTH OF PENNSYLVANIA:
: SS
COUNTY OF PHILADELPHIA :

Herman Mattleman, Esquire, being duly sworn according to law deposes and states as follows:

1. I was appointed to the Board of Education of the School District of Philadelphia in 1981 and have served as President of the Board of Education since December, 1983.

2. I am familiar with the provisions of the Pennsylvania Public School Code and Acmat Corporation's contracts with the School District of Philadelphia both of which require approval by the Board of Education before binding contracts may be entered into or before modifications or amendments to those contracts may be undertaken.

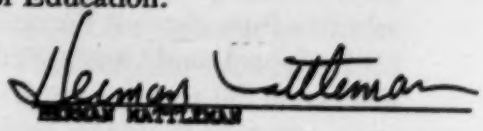
3. The School District of Philadelphia, with the approval of the Board of Education, entered into three fixed price contracts with Acmat Corporation for the removal of asbestos from Fairhill Elementary School, Lincoln Senior High School and Rush Middle School. The Board of Education did not approve nor did the School District ever issue any change orders with respect to the work at the Lincoln Senior High School. The School District, with School Board Approval, and Acmat did agree on June 26,

1984 to a price change on the Fairhill Contract in the amount of $18,000 and a change in specifications known as the "Work Practice Supplement." Under date of October 30, 1984, the School District, with School Board Approval, and Acmat entered into a Supplemental Agreement to the Rush Contract. This agreement added the first floor of the Rush School to Acmat's contract for an additional $656,000. In addition, the School District, with School Board approval, and Acmat agreed to Change Order No. 1 in the amount of $63,282.89 for extra labor, material and equipment necessary to wet wipe items in closets and cabinets at the Rush School.

4. Other than the amendment to the Rush Contract and the two change orders I have just reviewed, no other change orders or requests for additional compensation were ever approved by the Board of Education or issued by the School District in connection with the Rush, Lincoln or Fairhill contracts.

5. At no time did the Board of Education, by formal resolution or otherwise, ever waive compliance with the provisions of the Pennsylvania Public School Code or the provisions in Acmat Corporation's contracts with the School District which required formal approval of any modifications to Acmat Corporation's contracts by the Board of Education.

6. At no time, furthermore, did the Board of Education ever authorize any employee, agent or representative of the School District of Philadelphia to issue change orders or to otherwise enter into agreements for the payment of additional compensation to Acmat Corporation without the approval of the Board of Education.



Sworn to and Subscribed
Before me this 15th day
of August, 1988.

NOTARY PUBLIC
FRANCES FIORELLA
Notary Public, Phila., Phila. Co.
My Commission Expires Aug. 29,
1988

ANSWER OF ACMAT CORPORATION TO MOTION FOR SUMMARY JUDGMENT OF THE SCHOOL DISTRICT OF PHILADELPHIA

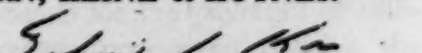
IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION		
Plaintiff	:	CIVIL ACTION
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA	:	
Defendant	:	
	:	
and	:	
HUGHES URETHANE CONSTRUCTION, INC.	:	
Third Party Defendant	:	NO. 85-7067

ANSWER OF ACMAT CORPORATION TO MOTION FOR SUMMARY JUDGMENT OF THE SCHOOL DISTRICT OF PHILADELPHIA

The School District of Philadelphia is not entitled to the entry of judgment on its behalf, because there exist genuine issues of material fact and because the School District is not entitled to judgment as a matter of law. In opposing the Motion for Summary Judgment, ACMAT relies upon its accompanying memorandum of Law, the exhibits thereto, and ACMAT's Memorandum of Law on Disputed or Unusual Legal Issues previously filed with its Pretrial Memorandum, a copy of which is attached hereto.

KORN, KLINE & KUTNER

BY: 

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION		CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA	:	
	:	
Defendant	:	
	:	
and	:	
	:	
HUGHES URETHANE CONSTRUCTION, INC.	:	
	:	
Third Party Defendant	:	NO. 85-7067

MEMORANDUM OF LAW OF ACMAT CORPORATION IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT OF THE SCHOOL DISTRICT OF PHILADELPHIA

I. INTRODUCTION

ACMAT Corporation ("ACMAT") entered into three separate contracts with the School District of Philadelphia ("School District") for asbestos abatement at Fairhill Elementary School, Lincoln Senior High School and Rush Middle School. ACMAT, having completed its work at the three schools, now seeks to recover damages in the amount of $4,389,268.00, allocated as follows:

Rush	–	$2,436,556.00
Fairhill	–	$1,134,021.00
Lincoln	–	$ 818,691.00

The original contracts, before extras and modifications, totaled $2,001,283.00. Owing to defects in the contract documents as bid, the School District's requiring of extra work outside the scope of the contract, incorrect and inconsistent

interpretation and administration of the work practices under each contract, unreasonable requests by the School District personnel or its agents, and other improper acts of the School District, ACMAT's project costs rapidly escalated. The School District failed to pay amounts due ACMAT, and ACMAT now has claimed balances due under the base contract, balances due for authorized and recognized extra work, balances due for work performed beyond the scope of the original contract document, and other damages particularized in the claim submitted by ACMAT.

The School District has filed a Motion for Summary Judgment. That Motion should not be granted because there exist genuine issues of material fact, and the School District is not entitled judgment as a matter of law. The moving party has the burden of establishing the non-existence of genuine issues of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 159-60, 90 S.Ct. 1598, 1609-10, 26 L.Ed.2d 142 (1970). The School District has failed to meet this burden. Summary judgment is not appropriate if there is the "slightest doubt," concerning the existence of material facts. *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cil,. 1974).

The pertinent facts, conveniently overlooked by the School District, were that School District employees and agents ordered ACMAT, verbally and in writing, to perform extra work. ACMAT was threatened with termination and liquidated damages if it refused to comply with those mandates.

ACMAT submitted timely claims for additional compensation. When payment was not forthcoming, ACMAT was promised that if it continued to perform, its claims would be equitably adjusted. The School District never advised ACMAT that its claims would not be submitted to the Board of Education or that the School District never intended to pay ACMAT for millions of dollars of extra work, of which they had knowledge. How convenient to now argue that ACMAT's claim cannot be between $5-6 million, when the base contracts total $2.001,283.00. The explanation is simple—the School District's employment of

people untrained and incompetent in asbestos abatement, coupled with the ordering of extra work, resulted in significant cost overruns.

The facts, and the law applied to the facts, require a denial of this Motion. The balance of this Memorandum of Law will amplify upon this introductory statement and will address the relevant factual and legal issues which require denial of tile School District's motion.

II. ARGUMENT

A. As A Matter Of Law, ACMAT Is Entitled To Assert A Claim For Additional Compensation From The School District Under Both The Pennsylvania Public School Code And The Contract Between ACMAT And The School District

Under the provisions of both the Pennsylvania Public School Code and the contracts for asbestos removal entered into by ACMAT and the School District, ACMAT is entitled to assert claims for additional compensation for work it performed on the three school projects. The foregoing is true even though ACMAT did receive formal approval from the School Board for the majority of the items of additional work for which it now seeks additional compensation. Under the facts of this case, the non-receipt of School Board approval does not preclude recovery of additional compensation.

1. Public School Code Requirement

Under the statutory law of the Commonwealth of Pennsylvania, a Public School Board must formally approve all contacts for work which has a value greater than One Hundred Dollars ($100.00). 24 Pa. C.S.A. §5-508 (Supp. 1987). Such a provision includes all modifications to a contract which had been entered into by the School District. *Matevish v. Ramey Borough School District,* 167 Pa. Super. 313, 74 A.2d 797 (1950).

Absent specific statutory approval, contracts with school districts generally are not enforceable unless formally approved by the appropriate School Board. *School District of Philadelphia*

v. Framlau Corp., 15 Pa. Comm. 621, 328 A.2d 866 (1974). There are, however, exceptions to this general rule. Primarily, these exceptions include instances dealing with situations where time is of the essence and the delay in waiting for School Board approval would be detrimental to the citizens of the Commonwealth. *See In re: Chester School District's Audit*, 301 Pa. 203, 219, 151 A. 81 (1930). If an emergency or other circumstance exists which limits the time available for Board approval, a School District or Board is justified in not meeting the requirements of the statute. *Id.*

In the case of *Smith Laboratories v. Chester School District*, 33 Del. Co. 97 (1946), the Court was faced with a situation where time was of the essence and School Board approval could not be obtained in adequate time. In *Smith Laboratories*, the pupils and teachers at a certain school were being made ill as a result of unknown causes and conditions at the school. The School District, through duly authorized officers, hired an investigator to determine the cause of the illnesses. The School District, however, had taken no formal action to have the hiring of the investigator approved by the School Board. Once the investigator discovered the cause of the illness, the School District refused to accept responsibility for his bill. *Id.* at 98.

The Court held that:

> In view of the emergency existing and the lack of knowledge as to what cost might be incurred, the defendant directors were fully justified in contracting for the services by their proper officers without waiting for a formal meeting in order to record the minutes of such action. Neither the time nor the conditions permitted any delay or discussion . . . . The safety of the school child is at all times the primary factor, and if necessary all requirements should be passed over in order to protect them.

Id. at 99-100.

The circumstances involved here are similar. ACMAT was involved in the removal and abatement of asbestos from three public schools during the summer break at all three schools. Its contracts provided that time was of the essence, and the hazard

imposed by the asbestos clearly jeopardized the health and welfare of the students and teachers. Faced with a constant demand for extra work from the School District, ACMAT could simply not wait for the formal approval of the Board. To do so would have created additional costs and expenses because ACMAT would have been required to stop what it was doing, clean up that area as best as possible, and begin anew in another part of the school, causing large scale inefficiences. Once formal approval was given, ACMAT would have had to restart in each room where it was forced to stop. The asbestos removal process, which required that an isolated area be totally cleaned and kept from further contamination thereafter simply did not lend itself to a piecemeal removal process. The extra cost would have been astronomical, and re-contamination of areas would have been likely.

Furthermore, the additional costs arising from the existence of asbestos overspray in the schools and other extra work was unknown during the course of its work. From its vantage point, ACMAT could not discern a reasonable cost for the extra work and, therefore, was compelled to perform on a time and material basis. Consequently, the School District could not submit a known price to the School Board until after ACMAT was done with the extra work. The work ACMAT encountered was out of the ordinary and a price could not have reasonably been set beforehand as would have been the usual case. Thus, as in *Smith Laboratories*, unknown cost, health and safety requirements, and time requirements justified performance of extra work without Board approval.

Because time was of the essence, the health and welfare of the citizens of the Commonwealth were involved, and the value of the work to be performed was unknown, the statutory provision requiring formal approval by the School Board could not have possibly been met at the time the work was to be done. This does not mean, however, that the statute should be disregarded. On the contrary, once the work had been completed for each change order, the School District, as required by the contract, should have made an equitable adjustment to the Contract amount. *See*, e.g., Fairhill contract §16, quoted *infra*

in Section IIB. When such an adjustment was made, the School Board would make the final approval of the adjustment and enter its approval into the School Board minutes as required by the statute. As with any act of government, a reasonableness standard would be applied to School Board approval at that time. It was inequitable and unconscionable for the School Board to use the statute at that time to withhold payment from ACMAT.

The cases.cited by the School District in its Memorandum of Law in Support of its Motion for Summary Judgment do not involve the conditions present here. The *Framlau* case, *supra*, involves a situation in which a plaintiff entered into a settlement agreement with the School District which was approved by the counsel for the School Board and the School Board president. *Framlau, supra*, 328 A.2d at 868. The Board, however, later rescinded the settlement agreement, saying that it was never formally approved by the Board as required by the statute. *Id.* at 869. The Court held for the School Board and ruled that the settlement agreement was unenforceable. That case does not involve a "time of the essence" problem, a health and welfare question, or a situation where the costs of the changes in the contract were unknown. Furthermore, the contract in *Framlau*, unlike those here, was expressly *conditioned* on subsequent approval by the Board, and did not affirmatively provide for an equitable adjustment. *Id.* at 870. Consequently, *Framlau* is clearly distinguishable from this case.

The *Matevish* opinion, *supra*, is distinguishable on the same grounds. There, a conflict arose when a plaintiff furnished a six year old bus rather than a new one as required under the transportation contract entered into with the School District. The use of the old bus was agreed to orally but was never formally approved by the School Board. *Matevish*, 167 Pa. Super. at 315-16. The Court ruled that the modification of the contract had to be approved by the School Board and, therefore, the contract was unenforceable. *Id*, at 317. *Matevish* does not involve questions of time, health, welfare, or uncertain costs. Nor did the contract involved require an equitable adjustment. The case deals with a bus, not the removal of asbestos which had

to be done in a limited amount of time and with the safety of the public in mind. It is therefore inapposite.

2. Contract Requirements

The requirement for approval by the School Board outlined in 24 Pa. C.S.A. §5-508 is supplemented by a provision in the contract between the School District and ACMAT which subjects adjustments to the contract or contract price to School Board approval. The clause states, "If such changes cause an increase or decrease in the contractor's costs of, or time required for, performance of the contract, an equitable adjustment *shall* be made and the contractor notified in writing accordingly, any such change in the contract price being subject to the approval of the Board." Fairhill contract, General Conditions, §16(a) (emphasis added).

Under such a provision. ACMAT is entitled to an equitable adjustment to the contract for any changes in the drawings or specifications of the contract. If such a change is made, the new contract price is subject to the approval of the School Board. Such clauses have been the subject of numerous legal actions in Pennsylvania, as well as other jurisdictions.

The School District seeks to bar ACMAT's claim for additional compensation for extra work by relying extensively on the case of *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*. 505 Pa. 42, 476 A.2d 904 (1984). In *Durkin*, the contractor entered into a contract for the construction of a new high school. Soon after the construction began, the contractor noticed discrepancies between the site plan provided by the School District under a separate contract with an engineering firm and the actual site conditions. The resolution of these discrepancies required additional work. The Authority's president sent a letter to the contractor recommending that the contractor continue working on the project and that the problem would be resolved at a later date. Relying on the president's representation, the contractor completed the work despite a contract provision requiring all change orders for extra work to first be approved by the School Board.

Rejecting the contractor's claim for additional compensation, the Court concluded that it was the duty of the contractor to anticipate in its bid additional excavation work. *Id.* at 906. In reaching its conclusion, the Court relied heavily on a contractual provision that gave the contractor the responsibility to determine the amount of "cut and fill" needed to complete the job, and to examine the site personally to satisfy himself as to the nature, character, quantity, and quality of work necessary for the job.

The Court in *Durkin* also rejected the theory accepted by the lower court that the president's letter constituted a waiver of the written order requirement. In reversing the Superior Court, the Supreme Court stated that the waiver of a public contract provision dealing with change orders can be accomplished only by formal written action and that the president's letter was not the act of the Board and only ambiguously referred to the disagreement between the parties. *Id.* at 907. The Court went on to state, "We have always rigidly imposed strict standards on contractors who deal with public bodies to prevent the unwarranted plundering of public funds, to uphold the integrity of the bidding process, and we see no reason to change our long established precedents today. We reiterate that public agreements can be altered only by the same formal municipal action that created them or express ratification by resolution of the public body." *Id.*

The *Durkin* case is factually distinguishable. First, the Court held in *Durkin* that apart from the question of Board approval, the contractor should have foreseen the condition requiring the extra work because the contract in *Durkin* imposed the responsibility on the contractor to determine the amount of cut and fill needed to complete the job. The contractor was aware of those duties and had every opportunity to make his own estimate of the necessary excavation and submit a bid including the additional excavation costs. Thus, *Durkin* stands for the proposition that a contractor is required to follow contract provisions requiring a site inspection.

Here, the extensive problems encountered by ACMAT could not have been known at the time of the initial inspection.

There is a clear factual dispute on this point. The significance of this fact becomes even clearer when one considers that ACMAT spent over four times its original estimate and over four times the estimate of the School Board. ACMAT's extra work was simply not reasonably foreseeable. The fact that the asbestos in the school was originally applied in an out-of-sequence manner, creating a substantial overspray problem that is uncustomary in the trade, added to the unforeseeability of the extra work demanded by the School District.

Second, a large part of the additional work performed by ACMAT did not require the modification of plans and specifications as was required in *Durkin*. Instead, ACMAT's additional work simply involved an interpretation of the plans and specifications in a rational, commercially feasible manner. Rather than the discovery of a single unforeseen condition, the facts here involves cardinal changes in the scope of ACMAT's work and the unfair administration and supervision of the Project by the School Board's air monitoring inspectors.

Finally, a major distinction between this case and *Durkin* is the purpose behind the two contracts. In *Durkin*, the contract was for the building of a new high school. Time was not of the essence, nor was the health and welfare of the citizens of the Commonwealth involved in the Project. Here, ACMAT's duties under the contract consisted of the removal of a dangerous substance from the halls of public schools during the summer break between terms. ACMAT was under enormous pressure to get the work done and to do it in a safe and expeditious manner. It did not have the luxury to stop in the middle of the project and wait for formal approval of a change order by the School Board, which, according to deposition testimony, typically takes more than thirty days to accomplish. Given the fact that time was of the essence, the job had to proceed without the issuance of formal change orders.

Applied to the fact of this case, *Durkin* cannot govern. The health and welfare of the citizens of the Commonwealth must take precedence over the protection of public funds.

The School District's reliance on *Morgan v. Johnstown*, 306 Pa. 456, 160 A. 696 (1931); *Montgomery v. Philadelphia*, 391 Pa.

607, 139 A.2d 347 (1958); *Dick Corporation v. State Public School Building Authority*, 27 Pa. Comm. 498, 365 A.2d 663 (1976); *Commonwealth Department of Transportation v. Burrell Construction Supply Co.*, 86 Pa. Comm. 62, 483 A.2d 589 (1984) and *Commonwealth Department of Transportation v. Anjo Construction Co.*, 87 Pa. Comm. 310, 487 A.2d 455 (1985) is also misplaced. None of the above cases deal with the fact situations even remotely similar to this case. For example, in the *Morgan* case, the Court ruled that "if the plaintiff was not willing to proceed under the contract, he should have refused to go on with the work until he obtained the proper written authority of the engineer." *Morgan*, 306 Pa. at 465. The facts here clearly reflect that ACMAT did not have the luxury of being able to wait for the proper authority of the School Board. Not only was time of the essence because of the possible health hazard caused by the asbestos, but the School District constantly threatened ACMAT with penalties for liquidated damages clauses of the contracts. Furthermore, unlike the *Montgomery*, *Burrell* and *Anjo* cases, the problem between the school District and ACMAT does not involve a single change order, but rather a continuous pattern whereby the School District would state that ACMAT was to proceed on a time and material basis for the extra work. If ACMAT did not proceed, the School District threatened termination of the contracts and extensive liquidated damages. While the *Dick* case is cited by the School District for the holding that a contractor may refuse to perform until it receives the contractually required written authorization, such a delay was not feasible in ACMAT's situation and would have caused extra work above that complained of in the present case.

Outside of the Commonwealth, several other jurisdictions have found that the written School Board approval requirement for extra work could be waived in circumstances in which time was of the essence. In *Stahelin v. Board of Education*, 87 Ill. App.2d 28, 230 N.E.2d 466 (1967), a contractor entered into a contract to build a new junior high school. Soon after work began, there was a change in the plans caused by architectural error. *Id.* at 467. As a result, the contractor incurred extra costs in construction. Under the applicable school code, extra costs

were required to be approved formally by the School Board. *Id.* at 468. However, the contractor continued work on the representations of the architect that the extra costs would be paid. In addition, several members of the School Board advised the contractor that all instructions were to be from the architect only. *Id.* at 469. As a result, not only did the Board not authorize the extra work, but it was not even fully aware of the changes made until after the job was completed.

The Court in *Stahelin* found that the provisions in the school construction contract requiring School Board approval for extra work was for the sole benefit of the School Board and could be waived by it. *Id.* at 470. The Board's delegation of authority to the architect resulted in such a waiver. Furthermore, time was of the essence in the building contract. The Court noted that the changes were of such a nature and made in such a time that if the contractor had halted construction and waited for the next Board meeting, the building would not have been completed on time and the contractor would have been open to severe criticism. *Id.* In addition, the Court held that the Board was aware that any extra work performed would be adjudicated upon completion of the work. Consequently, they were estopped from denying their obligation to pay simply because no formal action of "yeahs and nays" had been taken. The Court's reasoning was that without so estopping the School District, it would have resulted in serious unjust enrichment. *Id.*

Here, although changes in the contract ostensibly required written approval of the Board, the Board in fact delegated its authority to the School District. Furthermore, ACMAT was threatened with cancellation of the contract and possible legal action if it did not complete the work as scheduled. As a result of this pressure, ACMAT was forced into continuing work on the projects without waiting for the formal written approval of the School Board. Moreover, time was of the essence and there was a severe threat to the health and welfare of the citizens of the Philadelphia area if the work was not completed in a timely manner. Finally, the School District should be estopped from denying its obligation to pay ACMAT because it was well aware of the extra work required as evidenced by the fact that letters

were sent authorizing the extra work. Consequently, the Board would be unjustly enriched if it could reap the benefits of ACMAT's performance without fully compensating the contractor. *See also Lindbrook Construction v. Mukilteo School District No. 6*, 458 P.2d 1 (Wash. 1969) (holding that a School District was estopped from denying its obligation to pay when its representative directed work to proceed without a written order, even though one was required by the contract) and *C. Norman Peterson v. Container Corp.*, 218 Cal. Rpter. 592, 172 Cal. App. 3d 55 (1985)(holding that clauses requiring change orders to be approved in writing can be waived by an extremely tight time schedule as well as cardinal changes to the scope of the contract).

The case law upon which the School District relies is clearly distinguishable. None of those cases contain clauses providing for an equitable adjustment of the contract; none of them involve a situation in which time is of the essence; none of them involve circumstances which would not permit a contractor to simply stop its work and wait for the approval of the School Board; and none of them involve a continual pattern of threats of termination and liquidated damages which force the contractor to continue. To allow a School District to take advantage of a contractor because of such conditions would work an immense injustice. In such a situation, the oral or written directives of the School District representatives must be held to be the equivalent of School Board approval. If they do not rise to that level, the directives must be found to have given ACMAT the right to an equitable adjustment which would be subject to the reasonable approval of the School Board at a later time.

ACMAT is not attempting to circumvent either the statute or the contractual requirement of School Board approval. Rather, it is attempting to abide by these provisions as best it can under the circumstances involved. Given the conditions under which ACMAT was performing its contractual duties, it would have been unreasonable for ACMAT to await School Board approval. Furthermore, to allow the School District to take advantage of ACMAT's position with the School District's endless threats of termination and liquidated damages and for

the School District to later argue that ACMAT is not entitled to further compensation because of the statute or contractual provisions would create a grave inequity. While the purpose of these provisions is to protect the public from fraud and a plundering of its treasury, they should not be used to allow the School District to plunder its contractors.

B. As A Matter Of Law, ACMAT Is Entitled To Assert A Claim For The Reasonable Cost Of Work Performed Beyond The Scope Of Its Written Contracts, Under Theories Of Equitable Estoppel And Quasi-Contract

Even if the Court were to conclude that ACMAT is not entitled to compensation for extra work performed because such work was not formally approved by the School Board in writing, ACMAT is nonetheless entitled to reasonable compensation under quasi-contract and estoppel theories. ACMAT's claims under these theories are supportable based on the terms of the School District's contracts, and as a matter of law.

The School District's arguments against quasi-contract and estoppel recovery are simply regurgitations of its argument that the School Code and written contract provisions required School Board approval for work beyond the scope of the contracts. The School District argues that if a party does not expressly comply with a contractual provision requiring written approval of a public Board or authority, recovery under an estoppel or quasi-contract theory may *never* be had, no matter what the facts or circumstances. This is allegedly so because, otherwise, the sanctity of the formal approval process would be violated. School District Memorandum of Law, pp. 17-19.

The School District's argument that ACMAT is entitled only to compensation for School Board approved changes in the contracts ignores the terms of the contracts which expressly, and affirmatively provide for an "equitable adjustment" to compensate ACMAT for work beyond the scope of the contract. Each contract's General Conditions provides, as in Section 16 of the Fairhill contract:

(a) The School District may, at any time, subject to approval of the Board and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope, such changes to be made in writing. If such changes cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in contract price being subject to the approval of the Board.

(b) The determination of the increase or decrease in compensation to be paid to the contractor for additions to or reductions in the work, respectively, shall be determined by application of unit prices when such are set forth in the Special Conditions of the contract, or in those cases where unit prices are not applicable, by a lump sum mutually agreed upon by the Board and the contractor. If however, unit prices are not applicable and if the parties cannot agree upon a lump sum, then additional compensation to be paid the contractor shall be determined by the actual cost in labor and materials, plus fifteen percent (15%) for profit and overhead. Reductions in the contract price in the form or credits shall be determined by the actual net cost in labor and materials if the aforementioned lump sum cannot be agreed upon. The fifteen percent (15%) for profit and overhead will be retained by the contractor. The School District will make the final determination as to net cost of labor and materials.

(c) Should the contractor encounter subsurface and/or other conditions at the site materially differing from those shown on the drawings or indicated in the specifications, he shall immediately give notice to the School District of such conditions, before they are disturbed. The School District will investigate the conditions and if it finds that they materially differ from those shown on the drawings or indicated in the specifications, it shall make such changes in the drawings and/or specifications as it may find necessary.

> Any increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustment as to changes.
>
> (d) Verbal instruction given by way of the officers, agents, or employees of the Board which depart from the contract documents shall not be binding upon the Board.

Subsection (a) specifically requires "equitable adjustments" in the contract price. Use of the word "shall" mandates an equitable adjustment where contract changes cause an increase in the contractors cost of or time for performance. Although Subsection (a) states that any increased cost of performance is "subject to approval of the board", *mandatory* language of the contracts relating to equitable adjustments in the contract price created an affirmative obligation of the School District to present all such requests for equitable adjustments to the School Board, and required the School Board to exercise reasonableness in evaluating requests for equitable adjustments. The contract's language mandating an "equitable adjustment", "subject to" School Board approval does *not* make Board approval a condition precedent to recovery. At best, it creates an ambiguity in the contract with respect to whether and when Board approval was required, which, since it was drafted by the School District, must be resolved against it by implying a requirement that the School Board employ a "reasonableness" standard in its review of any requests for equitable adjustment. *See* Restatement (Second) of Contracts, §205.[1]

None of the cases cited by the School District in opposition to recovery in quasi-contract or estoppel involve contracts, like those here, with affirmative language *mandating* equitable adjustments. That the contracts make the equitable adjustments "subject to School Board approval" does not require that such adjustments be *rejected*. To the contrary, the contract language

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1. That the contracts contemplate reasonableness in determining the amount of an equitable adjustment is bolstered by Subsection (b) which sets forth a formula for compensation in the absence of an agreement between the School District and a contractor.

imposes a good faith obligation on the School District to present all claims to the School Board, and on the School Board to fairly and reasonably evaluate them. *See Tamaqua Borough v. Rush Township Sewer Authority*, 85 Pa. Comm. 421, 482 A.2d 1167, 1173 (law implies agreement to perform things according to reason and justice that party should perform in order to carry out purpose for which contract was made and to refrain from doing anything that would destroy other party's right to receive fruits of contract). Absent application of this standard, it cannot be said that the adjustment process imposed by the contracts was in any sense "equitable",[2] as required by the contracts.

The record before this Court reflects a consistent pattern of oral and written School District approvals to ACMAT to perform work beyond the scope of its written contracts. *See* Exhibits 1-35. In reliance on these explicit instructions, ACMAT performed hundreds of thousands of dollars of extra work. Yet, it is uncontroverted that most of ACMAT's requests for extra work were never even placed before the School Board for review, let alone fairly considered by the School Board for equitable adjustment. *See* Exhibits 42-44. The School District's contracts state that an equitable adjustment *shall* be made for extra work. Thus, the School District's argument, reduced to essentials, becomes a tautology: ACMAT cannot be accorded equitable relief because the School Board (although permitted to approve equitable relief) was not given the opportunity to approve payment for alleged extra work performed by ACMAT.[3] Buried within the rationale of this argument lies this flawed premise: the School Board is the sole and exclusive arbiter of ACMAT's

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2. "Equitable" means "Just; conformable to the principles of justice and right . . . just, fair, and right, in consideration of the facts and circumstances of the individual case." Black's Law Dictionary, Revised 4th Ed.

3. The discovery record establishes that many of ACMAT's requests for compensation for extra work were considered and *rejected* by lower level School District officials, without further review by the School Board. (Exhibits 42-43). In so doing, the School District officials clearly acted as agents for the School Board. If agents in rejecting ACMAT's claims, these School District officials must also be agents, binding the School Board, for all extra work *approved* by them and on which ACMAT was instructed to proceed.

entitlement to equitable compensation. The contracts do not so provide, as they mandate equitable adjustment for extra work performed.

In none of the cases cited by the School District did the contracts involve certain clauses, like those in this case, affirmatively mandating an equitable adjustment for extra work. In *Commonwealth v. Seagrams Distillers Corporation*, 379 Pa. 411 (1954), an *oral* contract for the transportation and delivery of liquor was construed. Quasi-contract recovery was denied, therefore, in the absence of an affirmative contract provision, as here, mandating an equitable adjustment. Once the School District chose to provide for an equitable adjustment in ACMAT's contract price, it exposed itself to quasi-contractual relief based on principles of estoppel. *Montgomery v. Philadelphia*, 391 Pa. 591 (1958) is not to the contrary. In that case, the contract provided that no claim for extra work would be allowed unless "ordered in writing by the engineer and approved by the recreation commissioner", a condition precedent to recovery. Here, the contract *creates a right* to an equitable adjustment, subject to subsequent School Board approval. This right to an equitable adjustment cannot be unreasonably witheld, given the contract language. *See Teodori v. Penn Hills School District Authority*, 413 Pa 127, 196 A.2d 306 (1964).

The School District also argues that ACMAT is not entitled to *quantum meruit* recovery because "ACMAT failed to proceed in accordance with the requirements of the School Code" to obtain School Board approval. However, the question of whether School Board approval was improperly witheld by the School District is a question of fact which can be resolved only upon determination of whether the work performed by ACMAT was in fact an extra to the contract. ACMAT has alleged: that certain work which the School District required was a "cardinal change" to the contract which fundamentally altered the contractual undertaking; that unforeseen and unforseeable conditions existed which created "differing site conditions" creating a right to additional compensation: and that the School District actively interfered with its work, thereby creating additional costs. Equitable adjustment for the claimed extra work is

contemplated by the contacts, subject to reasonable and fair approval and evaluation by the School Board. Because the question of whether the School Board actually, or should have, reviewed ACMAT's requests for extra compensation in a reasonable and fair way is one of fact, summary judgment should not be granted.

The disputed facts giving rise to ACMAT's claim have been fully developed in discovery. ACMAT can prove that it received written directives from high level and project level School District employees to perform thousands of dollars of extra work. The School District had an affirmative duty, based on the contracts, to submit ACMAT's requests for additional compensation to the School Board, and the School Board was required to promptly, fairly, and reasonably review those requests. As developed in discovery, neither the School Board nor the School District fulfilled their obligations. *See* Exhibits 42-43.

It is overwhelmingly clear that ACMAT relied on instructions from School District employees in performing large amounts of extra work. To prohibit recovery *as a matter of law* would be to permit the School Board to use its potentially bad faith refusal to evaluate ACMAT's claims as a sword to preclude ACMAT from proving its entitlement to compensation. The law does not and should not sanction this harsh result.

Where a contractor relies to his detriment on representations of a public authority, Pennsylvania law provides a quasi-contractual remedy based on estoppel. in *Derry Township School District v. Suburban Roofing*, 102 Pa. Comm. 54, 517 A.2d 225 (1986), the court held that theories of equitable and promissory estoppel *are* applicable to public contracts and governmental agencies, and expressly rejected a School District's contention that a construction contract with a clause requiring all changes to be in writing was not subject to a claim based on promissory or equitable estoppel. The court explicitly held that the doctrine of promissory and equitable estoppel *are* applicable to public contracts. 517 A.2d at 228-229.

In *Derry*, a School District official modified the amount of material which it had previously orally ordered a contractor to procure pursuant to a contract for replacing a roof. Because the

contractor had relied on an earlier representation, it had ordered material some of which was useless as a result of the changes. The change had not been approved in writing as required by the contract. The court held that because the School District had induced the contractor to purchase supplies which thereafter could not be used, promissory or equitable estoppel prevented it from denying liability. *Id* at 229.

The School District attempts to distinguish *Derry* from this case because, supposedly, "this is not a case where the School District initially interpreted the contracts one way and later another in which ACMAT had to 'special order' materials which would be useless to ACMAT if the School District later determined that less work and materials would be involved". School District Memorandum of Law, p.22. To the contrary, this *is* a case where differences in contract interpretation by the School District resulted in the expenditure of huge amounts of additional labor and material. The proper scope of ACMAT's work under the contracts forms the primary basis for much of its claim. During its performance, ACMAT and the School District were continually at odds over what was expected of ACMAT under the contract; this case is almost exclusively about differences in contact interpretation. Because the essence of the dispute between ACMAT and the School District is one of contract interpretation, and the proper scope of work as defined in the contracts, equitable and promissory estoppel theories, pursuant to *Derry*, are cognizable against the School District.

Moreover, the contracts in this case affirmatively *require* an equitable adjustment for work performed which is outside the scope of the contracts. To argue that the mandate of *Derry* does not apply here merely because "special order" materials are not involved is to unfairly and disingenuously limit its holding, and would produce the absurd result of permitting estoppel claims against public authorities only where its promises resulted in "useless" materials being ordered. Derry's holding is not so limited; it permits recovery against a public agency based on

estoppel principles where, as a result of contract interpretation, work outside the scope of a contact is performed.[4]

In deciding the issue of ACMAT's entitlement to recover based on equitable and promissory estoppel principles, the Court should be mindful that the doctrine of equitable estoppel is one of fundamental fairness. *Brog Pharmacy v. Department of Public Welfare,* 87 Pa. Comm. 181, 687 A.2d 49 (1985). Pennsylvania law emphatically authorizes recovery against public agencies based on estoppel principles. *Plymouth Twp. Council v. Montgomery Co.,* 531 A.2d 1158, 1162 (Pa. Comm. 1987); *Commonwealth v. Dixon Contracting Company,* 80 Pa. Comm. 438, 471 A.2d, 934 (1984); *Frank v. County of Greany,* 50 Pa. Comm. 30, 412 A.2d 663 (1980).

Here, the facts as developed in discovery reflect that the School District repeatedly ordered ACMAT to perform work, much of which ACMAT believed to be outside the scope of its contracts. *See* Exhibits 1-37. In so doing, the School Board repeatedly represented in writing to ACMAT that it would be compensated for extra work. Yet, the facts reflect that the School District presented only two change order requests to the School Board, leaving the lion's share of ACMAT's claims for extra work compensation, totalling hundreds of thousands of dollars, *unreviewed* by the very Board whose review is *required* by the contracts! ACMAT had no control over the School Board review process. Therefore, the School District had an affirmative obligation to submit all of ACMAT's claims to the School Board; it clearly did not do so. To grant summary judgment to the School District based on lack of School Board approval would be

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4. The *Derry* decision distinguishes *Nether Providence Twp. School Authority v. Durkin & Sons, Inc.,* 505 Pa. 42, 476 A.2d 904 (1984) because *Derry* involved "contract interpretation" and *Durkin* involved the enforceability of an oral change order. The *Durkin* decision did *not* bar estoppel claims against public authorities; it held simply that based on the facts of that case an oral change order was not enforceable. Where, as here, the primary issue is one of contract interpretation, *Derry* is clearly incompatible with *Durkin* and permits recovery, based on estoppel theory, for claims based on oral and written representations of School District officials, whether or not formally approved by the School Board.

to condone a system in which authorized representatives of a School District can: 1) repeatedly instruct a contractor, orally and in writing, to perform work which the contractor believes to be beyond the scope of a contract; 2) promise orally and in writing that the contractor will be paid for this work: 3) threaten the contractor with termination of its contract and liquidated damages if the extra work is not performed; 4) fail to submit the contractor's requests to the School Board for approval; and 5) then claim that lack of final School Board approval acceptance precludes recovery by the contractor. The aforedescribed process would give a license to public school districts to use lack of School Board approval as a sword to defeat contractors, legitimate claims for work performed based on express instructions from School District officials. This would surely be the moral equivalent of acquitting a child for the murder of his parents because he was an orphan! Not having followed its own contract, the School District cannot use that contract's processes to defeat ACMAT's claim.

Equity will not allow a School District to act as both judge and jury with respect to a contractor's claim. Given that ACMAT's contracts affirmatively require an equitable adjustment, that the facts reflect that the School Board was given the opportunity to review or approve ACMAT's extra work claim, and that ACMAT performed work based on written and oral promises of compensation from School District officials, ACMAT's claims based on equitable and promissory estoppel are cognizable as a matter of law.

Lastly, a substantial portion of ACMAT's claim for equitable adjustment arises from unforeseen conditions which required an inordinate amount of work not anticipated by ACMAT. For instance, ACMAT claims that asbestos overspray on large portions of concealed portions of the Rush School was unforeseeable and resulted in a significant amount of additional work.

Subsection (c) (e.g. section 16(c) of the Fairhill Contract) of the contracts' general conditions quoted above provides for adjustment to the contract price arising from the discovery of conditions materially differing from the drawings or specifications. School Board approval of the increase or decrease for work

created by unforeseen conditions is *not* required by the contract. Section 16(c) provides for adjustments of the contract price for unforeseen conditions in the "manner provided herein". Section 16(b) provides for the manner of adjustment to the contract price adjustment and is *silent* as to School Board approval. Thus, contract adjustments based on unforeseen conditions under the contracts did *not* require approval by the School Board.

In *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964), the Pennsylvania Supreme Court held that a School District's contract which provided for price adjustments for unforeseen conditions without formal School Board approval could be adjusted even though such adjustments were not done in writing. 196 A.2d at 309. As in *Teodori*, so here the contract allows adjustments in price for work arising from unforeseen conditions, without regard to School Board approval. The School District is therefore not entitled to summary judgment with respect to ACMAT's claim for compensation for work arising from unforeseen conditions.

C. The School District's Motion For Summary Judgment On The Fraud Count Should Be Denied

In its Motion, the School District argues that ACMAT should not be permitted to recover on its fraud theory. However, ACMAT's fraud theory is viable and should withstand the School District's Motion for Summary Judgment, in that: (1) this Court has already ruled on a large part of the School District's Motion regarding fraud; (2) ACMAT's fraud claim is separate and distinct from ACMAT's breach of contract claims and may be pursued independently; and (3) there are genuine issues as to the material facts forming the basis of ACMAT's fraud claim.

At an earlier stage of this litigation, the School District filed a Motion to Dismiss the fraud count (Count VIII) of ACMAT's Amended Complaint. This earlier Motion raised arguments which overlap those presently before this Court, and the Court ruled in favor of ACMAT. For instance, the School District argued there, as it does in the present Motion, that ACMAT's

fraud count was a "thinly veiled attempt to contract claims as an action for fraud." The Court issued an Order, dated January 8, 1987, which denied the School District's Motion to Dismiss Count VIII of ACMAT's Amended Complaint. By raising arguments in the present Motion which are similar, if not identical, to those raised in the earlier motion, the School District is, in effect, impermissibly seeking review of this Court's earlier unappealable Order denying the Motion to Dismiss. Under the law of the case doctrine, the January 8, 1987 Order—to the extent that it rejected the School District's arguments raised again in the present Motion—is controlling and precludes the granting of the Motion for Summary Judgment as to the fraud count. The School District's present Motion is a thinly veiled attempt to recast its Motion to Dismiss as a Motion for Summary Judgment.

In any event, ACMAT is permitted under the law to pursue its fraud claim, despite the fact that it has brought contact claims in the same action. The fraud court is independent of ACMAT's contract claims. *Iron Mountain Security Storage Corp. v. American Specialty Foods, Inc.*, 457 F.Supp. 1158 (E.D. Pa. 1978), cited by the School District as authority "or the distinction between tort and contract actions, involved a motion to dismiss a tort claim based on bad faith or malicious breach of non-insurance contractual duties. The claim did not involve fraud, and the case is inapposite. The Court there concluded that Pennsylvania would not allow tort recovery for the breach of an implied contractual duty of good faith and fair dealing under the circumstances and therefore dismissed the count alleging that claim. The Court in *Iron Mountain* did not state that a party is barred from bringing a fraud cause of action based upon misrepresentations made in connection with a contractual undertaking.

Argo Welded Products, Inc. v. J.T. Ryerson Steel & Sons, Inc., 528 F.Supp. 583 (E.D. Pa. 1981), also cited by the School District, likewise did not involve a claim based on fraud. There the plaintiff pursued claims for breach of contract and negligence

in supplying non-conforming goods. The failure to supply non-conforming goods was in actuality a breach of the contractual obligation, and therefore the cause of action in *negligence* was dismissed.

Where a plaintiff's claim is based on the tort theory of fraud, the plaintiff is permitted to pursue the fraud cause of action, even if it arises from contractual undertakings and even if the plaintiff is simultaneously pursuing a breach of contract theory. In *Shulman v. Continental Bank*, 513 F.Supp. 979 (E.D. Pa. 1981), plaintiffs' Complaint contained five counts, including counts for breach of contract and fraudulent misrepresentation in connection with the underlying contract. The defendant filed a summary judgment motion, and the Court denied the motion as to both the contract count and the fraud count. The Court did not even question whether the plaintiff could proceed on both grounds simultaneously, as it was evident that one theory of recovery would not preclude the other.

Similarily, in *Olkowski v. The Prudential Insurance Company of America*, 584 F.Supp. 1140 (E.D. Pa. 1984), the plaintiff's Complaint alleged both breach of contract and fraud. The defendant sought to have the fraud count dismissed, and the Court denied the Motion. Claims for breach of contract and fraud, even when the fraud arises from the contract, are not mutually exclusive. *See Bolus v. United Penn Bank*, 363 Pa. Super. 247, 525 A.2d 1215 (1987) (Court affirmed jury's verdict in favor of plaintiff in suit alleging both breach of contract to provide financing for construction project and negligent misrepresentation to fund the project).

The School District finally argues that ACMAT cannot have justifiably relied on the School District's misrepresentations. The issue of ACMAT's reliance is a disputed factual issue to be presented to the jury. ACMAT proceeded with its work under the contract and with the extra work, based on the School District's instructions and in reliance on the representations of the School District that ACMAT would be paid. *See* Exhibits 1-49. it is a question of fact as to the reasonableness of ACMAT's

reliance on the representations of the School District, considering all the circumstances, including ACMAT's reasonable expectations that the School District was taking any necessary steps to obtain the School Board's approval and the School District's continued assurances that ACMAT would be paid for its extra work.

D. A Factual Dispute Exists With Respect To The Enforceability Of That Portion Of The Contracts Purporting To Exclude Damages For Delay

The School District seeks summary judgment with respect to ACMAT's recovery of delay damages based solely on the application of a "no damage for delay clause" in the contracts. However, a factual dispute exists as to the enforceability of the no damage for delay clause which precludes the granting of summary judgment.

A "no damage for delay" clause in a contract is an exculpatory clause which is to be strictly construed so as to avoid manifest injustice. As a result, a number of well-established exceptions to the enforceability of no damage for delay clauses have been created. *See generally* 74 A.L.R.3d 187 (1976).

Pennsylvania courts are reluctant to enforce "no damage for delay" clauses, and have created a number of exceptions to their enforceability. For example, in *Commonwealth Dept. of Highways v. S.J. Groves & Sons, Inc.*, 20 Pa. Comm., 526. 343 A.2d 92 (1975). the court refused to enforce a no damage for delay clause where the owner caused delays by interfering with the contractor's access to a portion of the construction site for an extended period of time. *Accord, Gasparini v. Pa. Turnpike Authority*, 409 Pa. 465, 187 A.2d 157 (1963), *Sheehan v. City of Pittsburgh*, 213 Pa. 133, 62 A.642 (1905).

Here, ACMAT claims that the School District actively interfered with its performance of the contracts by poor administration and through contract interpretation creating burdensome requirements not found within the specifications. At the time it entered into the contracts, ACMAT could not have contemplated the delays it would sustain as a result of the School

District's interference into the manner in which it would perform its contracts. The delays sustained by ACMAT therefore do not come within the ambit of the "no damage for delay clause," *Commonwealth State Highway & Bridge Authority v. General Ashpalt Paving Co.*, 46 Pa. Comm. 114, 405 A.2d 1138 (1979).

Moreover, a factual dispute exists between ACMAT and the School District as to whether the School District prevented ACMAT from timely performing its contracts. When one party to a contract prevents or impedes performance by the other party, it may not avail itself of exculpatory contract provisions which benefit it. Simply put, a party to a contract may not take advantage of its own breach thereof. *Rainier v. Champion Container Co.*, 294 F.2d 96 (3rd Cir. 1961): *Craig Cool Moving Co. v. Romaini*, 513 A.2d 437, 355 Pa. Super. 296 (1986), alloc. granted 522 A.2d 50. A question of fact exists here as to whether the School District breached its contracts with ACMAT by actively interfering with ACMAT's performance. Therefore, applicability of the "no damages for delay clause" must await resolution of the aforementioned factual dispute. The Motion for Summary Judgment should therefore be denied.

E. The School District Does Not Have Total, Unrestrained Authority To Determine The Net Costs Of Labor And Materials For Purposes Of ACMAT's Compensation For Additional Work

In its Memorandum of Law, the School District takes the position that in certain circumstances, it has the right to make the final determination as to net costs of labor and materials for purposes of compensating ACMAT for additional work performed. The School District claims that in these circumstances, it is the "final arbiter of labor and material costs." School District Memorandum of Law, p. 32. The School District fails to acknowledge that any right it may have to determine labor and material costs is subject to the standards of reasonableness and good faith, which are superimposed on contracting parties by law.

It is well-recognized that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Restatement (Second) of Contracts. §205. *See Baker v. Lafayette College,* 350 Pa. Super. 68, 504 A.2d 247, 255 (1986) (evaluation and review process of faculty member must be honest and meaningful, not a sham formality designed to ratify an arbitrary decision already made); *Germantown Manufacturing Co. v. Rawlinson,* 341 Pa. Super. 42, 491 A.2d 138, 148 (1985) (court imposed on contracting party a promise to act in good faith in determining and setting amount owed); *Loos & Dilworth v. Quaker State Oil Refining Corp.,* 347 Pa. Super. 477, 500 A.2d 1155, 1160 (1985). *See also Daniel B. Van Campen Corporation v. Building and Construction Trades Council,* 202 Pa. Super. 118, 122, 195 A.2d 134 (1963) (law implies agreement by contracting parties to perform those acts that according to reason and justice they should perform in order to carry out purpose of contract and to refrain from doing anything that would injure other party's right to receive fruits of contract).

Thus, in making any adjustment in compensation payable to ACMAT for work performed, any determination of the School District must be within the confines of good faith and reasonableness. ACMAT disputes the good faith and reasonableness of the School District in making such determinations under the contract. *See* report of Kellogg Corporation concerning damages, which was submitted with ACMAT's pretrial memorandum. Whether or not the School District exercised good faith and reasonableness is a factual issue in dispute. The School District has pointed to no factual basis to support its determinations, and the propriety of its determinations represents a jury question. Summary judgment should be denied on this issue.

F. The School District Is Responsible For The Cost of Removing Asbestos Overspray At The Rush School

ACMAT is entitled to additional compensation from the School District of Philadelphia for removal of overspray at the Rush School. This claim arises by reason of the failure of the School District to advise ACMAT, prior to the date on which its

bid was submitted to the School District, that overspray at the Rush School was far greater than normal.

The overspray resulted from the application, out of sequence, of asbestos fireproofing above the ceiling at the Rush Middle School. Contrary to usual practice, fireproofing had been applied after ceiling grids were installed, after light fixtures were installed, after ducts were installed, and after conduit was run. See Affidavit of Henry W. Nozko, Jr., attached hereto.

A pre-bid inspection was held at the Rush Middle School. Representing ACMAT at the pre-bid inspection was Fred Dalton. A walking tour of the second floor of the Rush School did not reveal to ACMAT's representative, or to the representatives of other contractors present, the serious, pervasive overspray problem at the Rush Middle School. Because the inspection took place during the school year when students were attending class, because no one was suited-up in protective clothing and wearing respirators, because the leader of the tour (a School District representative) never mentioned the overspray problem, and because the contract documents did not address the serious overspray problem, ceilings were not removed to inspect above the ceilings. In fact, such an inspection would have exposed the inspectors, students, teachers and others within the building to a potential serious health hazard. See Affidavit of Henry Nozko, Jr.

It is therefore understandable why ACMAT depended upon the accuracy of the plans and specifications in submitting its bid, since it could not conduct an inspection above the ceiling. It was the absolute responsibility of the School District to acquaint ACMAT with any unusual conditions which might affect the amount of its bid. Overspray, to the extent found in the Rush School, was such an unusual condition.

Unlike conditions on any job that ACMAT had previously encountered, spray-on fireproofing at the Rush Middle School had been applied after the ceiling grid was installed, after the light fixtures were hung, after conduit was run, and after ducts were installed. ACMAT anticipated normal overspray but never anticipated the pervasive overspray problem it encountered at

the Rush School. The job ACMAT ultimately performed was not the job that ACMAT was asked to perform.

Certainly, the School District, during the bid stage, should have informed ACMAT that there was an extensive overspray problem. No one knew, or could have known, the job better than the School District. In fact, prior to the job's being bid by ACMAT and others, the School District conducted bulk sampling tests at the Rush Middle School. The School District had an affirmative obligation to inform ACMAT about the overspray condition, of which it had knowledge.

The only issue presented is whether the contract language bars ACMAT's claim. The School District acknowledges that the overspray was greater than anticipated but asserts, nevertheless, that ACMAT should have discovered the problem. Having failed to do so, ACMAT's claim is barred. says the School District.

Almost all bid packages for construction documents require bidders to conduct an inspection of the job site prior to submitting bids. The obvious import of this language is to place upon the contractor the risk of coping with whatever conditions might have been ascertained on a "reasonable inspection". The key word is "reasonable".

In *M. A. Mortenson Co.*, 87-1 BCA (CCH) §19,598 (1987) Mortenson contracted to construct a B-IB support facility at the Ellsworth Air Force Base in South Dakota. Mortenson's contract contained standard provisions regarding site inspection and conditions affecting the work. The bid package included drawings showing the areas wherein concrete and asphalt had to be removed in order to perform the work. Mortenson performed the site inspection as required by the bid instructions. Following the award of the contract to Mortenson, it discovered quantities of concrete far greater than it had anticipated. Mortenson advised the government that additional work would be required to perform the contract and requested an equitable adjustment for the extra work and delays. The contracting officer denied Mortenson's claim, saying that the contract site investigation provision and the drawings identified the areas wherein concrete and asphalt would have to be removed.

The Board of Contract Appeals (BCA) granted Mortenson's claim for an equitable adjustment, basing its decision on the fact that the drawings and site investigation would not have alerted it to the additional work. Mortenson established that the bid drawings did not indicate the requirement of additional concrete removal and it was impossible to determine from the drawings and site investigation that such work would ultimately be required.

Space prohibits citing each and every case which stands for the proposition that the ultimate resolution of a claim for additional compensation based on a differing site condition depends on whether or not the contractor's interpretation of the plans and inspection of the site were "reasonable". *See Minter Roofing Co.*, 87-1 BCA (CCH) 19,386 (1986), wherein the BCA denied the contracting officer's Motion for Summary Judgment because of the existence of genuine issues of fact as to the reasonableness of the contractor's interpretations of the plans and the availability of site access to ascertain whether the contract documents had been complied with. *See also Granite-Groves v. Washington Metropolitan Area Transit Authority*, 845 F.2d 330, 334 (D.C. Cir. 1988), where the court stated that in interpreting a contract, it is proper for the court to place itself into the shoes of a "reasonable and prudent" contractor and decide how such a contractor would act in the situation at hand.

There exists in this case a genuine issue of material fact. That being so, this Motion for Summary Judgment must be denied. Jurors should determine whether ACMAT was reasonable in its interpretation of the plans: whether the contract documents showed the extensive overspray: whether ACMAT's pre-bid inspection should have revealed the existence of extensive overspray; whether ACMAT had access to the area where the extensive overspray existed: whether it was reasonable to look above the ceilings; whether ACMAT would have created a health hazard to occupants of the building if it had been permitted to conduct an extensive site investigation; whether ACMAT would have exposed its employees and others to danger if an inspection was undertaken without appropriate protection; whether ACMAT had sufficient opportunity to discover the

condition; whether ACMAT was reasonable in relying on the fact that spray on fireproof is almost never performed out of sequence as it was at the Rush School; whether ACMAT was reasonable in its reliance on the plans and specifications which did not alert ACMAT to the existence of pervasive overspray; and whether the School District possessed or should have possessed superior knowledge to ACMAT as to the existence of extensive overspray. Considered individually or together, these questions raise genuine issues of fact that must be resolved by a jury.

The School District relies heavily on the contract language to support its argument that ACMAT's claim should be barred. Referring to the Rush contract, Special Conditions, SC-07, the School District argues that ACMAT had the responsibility to examine the site before bidding the project. The contractor had the responsibility of ". . . . informing himself fully of all determinable existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same." It was clearly a factual issue whether the extensive overspray was "determinable" given the circumstances existing when the inspection was conducted and the "limitation of the site(s)." Beyond any doubt, a jury question exists. These issues are not determinable by a motion for summary judgment.

III. CONCLUSION

For all of the foregoing reasons, plaintiff, ACMAT Corporation, respectfully requests that the motion for Summary Judgment of the School District of Philadelphia be denied.

KORN, KLINE & KUTNER

BY: _____

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(215) 751-0500

Attorney for Plaintiff
ACMAT Corporation

AFFIDAVIT OF HENRY W. NOZKO, JR.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION, *Plaintiff,*	:	CIVIL ACTION NO. 85-7067
v.	:	
THE SCHOOL DISTRICT OF PHILADELPHIA, *Defendant.*	:	

STATE OF CONNECTICUT :
: SS. East Hartford
COUNTY OF HARTFORD :

Henry W. Nozko, Jr., being duly sworn according to law, deposes and states as follows:

1. I am the Executive Vice President of ACMAT Corporation.

2. I am familiar with the contract between the School District of Philadelphia and ACMAT Corporation relating to the removal of asbestos from the Rush Middle School.

3. ACMAT Corporation submitted a bid to the School District of Philadelphia for the removal of asbestos at the Rush Middle School.

4. The bid was submitted after a pre-bid meeting was held by the School District of Philadelphia.

5. The pre-bid meeting was attended by Fred Dalton, a former employee of ACMAT Corporation.

6. The pre-bid meeting was held on January 24, 1984. ACMAT Corporation visited the Rush Middle School prior to submitting its bid.

7. Fred Dalton, representing ACMAT Corporation, attended the pre-bid meeting along with representatives of other asbestos removal contractors.

8. Fred Dalton took a walking tour of the Rush Middle School.

9. The walking tour included rooms on the second floor of the Rush Middle School.

10. On the date of the tour, the Rush Middle School was in use, occupied by students, teachers, and others.

11. Fred Dalton had been advised that there was asbestos above the ceilings on the second floor of the Rush Middle School.

12. During the inspection, Fred Dalton was not wearing a respirator and protective clothing, nor were any of the rooms isolated and prepared for the asbestos removal work.

13. Fred Dalton did not look above the ceilings because "friable" asbestos, located above the ceilings, could not be disturbed since it would create a potential health hazard to the inspectors and occupants of the building.

14. To fully ascertain the extent of overspray above the ceilings, one would have to perform demolition work to the building which was an activity beyond the scope of the perfunctory pre-bid walking tour.

15. A bulk sampling test, performed at the Rush Middle School prior to the date on which ACMAT submitted its bid, could not reveal the extensive overspray problem at the Rush Middle School.

16. The contract documents, including the plans and specifications, did not disclose to ACMAT the extensive overspray problem at the Rush Middle School.

17. The School District does not deny the existence of extensive overspray, only our right to be compensated for the expense of removal of additional overspray.

18. The overspray problem at the Rush Middle School was the most extensive that ACMAT has encountered since it began asbestos removal work in 1975.

19. When the school was originally constructed the asbestos fireproofing was applied out of sequence, after installation of ceiling grids, light fixtures, ducts and conduit. This caused all of these building systems to be covered with overspray which under normal circumstances would not have occurred. This condition was not mentioned in any bid documents or revealed at any pre-bid meeting. Nor could this condition be ascertained by a pre-bid walk through.

20. The facts set forth in this Affidavit are based on my personal knowledge and on conversations with others, including but not limited to Fred Dalton.

HENRY NOZKO, JR.

Sworn to and subscribed
before me this 30th day
of August, 1988.

Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION	:	CIVIL ACTION
Plaintiff	:	
	:	
v.	:	
	:	
SCHOOL DISTRICT OF PHILADELPHIA	:	
Defendant	:	
	:	
and	:	
	:	
HUGHES URETHANE CONSTRUCTION, INC.	:	
Third Party Defendant	:	NO. 85-7067

CERTIFICATE OF SERVICE

I, Robert A. Korn, Esquire, hereby certify that on August 31, 1988, true and correct copies of the Answer of ACMAT Corporation to Motion for Summary Judgment of the School District of Philadelphia and the Memorandum of Law of ACMAT Corporation in opposition to the School District's Motion for Summary Judgment were served by United States Postal Service, first class, postage prepaid upon all counsel of record.

KORN, KLINE & KUTNER

BY: _____

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Attorney for Plaintiff
ACMAT Corporation

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR REARGUMENT IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION,
Plaintiff,

Civil Action No. 85-7067

v.

Hon. James T. Giles

SCHOOL DISTRICT OF PHILADELPHIA,
Defendant.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR REARGUMENT

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT CORPORATION,
Plaintiff,

v.

SCHOOL DISTRICT OF PHILADELPHIA,
Defendant.

Civil Action No. 85-7067

Hon. James T. Giles

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR REARGUMENT

Preliminary Statement

This memorandum is submitted in support of the plaintiff's motion for reargument of the Court's order dated December 21, 1988, granting partial summary judgment to the defendant. See Exhibit "1". Permission to reargue was granted by the Court at the conference held on April 10, 1989.

A fair adjudication of this application requires an appreciation of the unique circumstances that shape the performance of work at a construction project and the myriad of special clauses that are unique to construction contracts.

It is respectfully submitted that an interpretation requiring express School Board approval to any deviation from the contract documents is improper and not in conformity with the terms of the contract or prevailing law. The claims asserted by Acmat Corporation are not precluded by statutory or contractual language that requires School Board approval. That requirement was complied with to the extent necessary.

FACTS

In or about April and June 1984, Acmat Corporation ("Acmat") and the School District of Philadelphia ("School District") entered into separate contracts for asbestos abatement at three school buildings in the City of Philadelphia. The schools were Fairhill Elementary School, Lincoln Senior High School and Rush Middle School. The Fairhill contract, dated April 16, 1984, was for a fixed price in the sum of $446,000. In June 1984 the School District initiated a change in specifications relating to air monitoring and work practices at the Fairhill School. School Board approval was obtained for the change in work and for an increase in the contract price in the sum of $18,000.00.

The Lincoln contract, dated June 11, 1984, was for a fixed price in the sum of $223,000. School Board approval was obtained.

The Rush contract, dated June 11, 1984, was for a fixed price in the sum of $595,000 and involved asbestos removal from the second floor only. Thereafter, the School District chose to remove asbestos from the first floor of the Rush School and entered into a Supplemental Agreement dated October 30, 1984, for the sum of $656,000. Formal School Board approval was obtained for the initial agreement and the Supplemental Agreement. The School District also elected to clean certain property stored in closets and cabinets in the building. This work was not included in the original contract and the School District issued a change order with School Board approval. Although the change order in the sum of $63,282.89 was executed by both parties, Acmat expressly reserved its right to seek additional compensation. The School District executed the change order and unilaterally deleted the language inserted by Acmat.

All of the aforementioned contracts and unilaterally initiated changes by the School District were approved by the School Board.

During the performance of its work Acmat encountered unanticipated differing site conditions that caused significant increases in the amount of work it had agreed to perform and in

the cost of performance. The record is replete with correspondence and other documentation in which the School District acknowledged the additional work Acmat encountered due to the differing site conditions. Indeed, the School District, in many instances, ordered that the additional work be performed and even attempted to amicably adjust the compensation due Acmat for this work. The site conditions simply caused an increase in the amount of work Acmat had agreed to perform. The fact that claims could arise from differing site conditions was expressly contemplated by the agreements. See paragraph 14(c) of the Rush Contract for an example.[1]

Other claims involve the *amount* owed for work unilaterally ordered by the School District with School Board approval.

Another category of claims are based on work which Acmat asserts lie outside the scope of the contract. This is work that the School District ordered Acmat to perform in the mistaken belief that it was within the scope of the contract. This work was not the result of a unilateral decision of the School District to modify the scope of the contract pursuant to paragraph 14(a) of the contract, but was insisted upon by the School District in the erroneous belief that it was included in the contract. Even the most cautiously drafted construction contract will include terms and drawings which may be interpreted differently by parties to an agreement. Interpretation is often based on custom and usage in a particular trade. The claims that come within this category are the result of a simple common law breach of contract and there is no procedure in the contract for their resolution. They are compensable against the School District in accordance with the common law, as they would be against any party that breached a contract. The School District's improper administration of the contract and interference with Acmat's work also give rise to claims for breach of contract. A prime example is the unreasonable inspections and late reporting of test results that delayed Acmat and caused it to perform more work. Other

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1. For ease of reference, citations to the construction contracts correspond with sections in the Rush agreement.

examples are conflicting and late directions to do work and the directions to wear full face masks and to install a third layer of polyethylene.

Another category of claims are based on the increased costs caused by owner generated disruptions and delays to the performance of the contracts. These claims were summarily dismissed by the order of December 21, 1988, on the basis of the "No Damage for Delay" clause in the parties' agreement. See paragraph 15(c) of the Rush Contract for example. However, for reasons set forth herein, the scope of these clauses has been limited by the courts and Acmat should have the opportunity to present this issue to the jury.

An additional claim is for the contract balance which has been retained by the School District in the apparent sum of $142,090.72.

For its part, the School District has counterclaimed for liquidated damages and credits for work which was allegedly omitted or improperly performed.

Argument

POINT I

THE PROVISIONS OF THE CONSTRUCTION CONTRACTS DO NOT PRECLUDE RECOVERY OF THE CLAIMS ASSERTED BY ACMAT

The School District's interpretation of the agreement improperly merges the paragraphs of Article 14 of the General Conditions of the contract and distorts the manifested intent of the parties.

The reality of a construction project is that despite the many hours of planning by design professionals and construction experts, contingencies arise that require changes in the methods and manner of performance by the contractor. The construction contract may set forth different procedures for dealing with contingencies. The particular procedure to be utilized will usually depend on the cause of the changed work.

A. Paragraph 14(a) is a unilateral changes clause.

Paragraph 14(a) is designed to deal with changes initiated by the School District. Clauses such as these are unique to construction contracts because they allow the owner to issue unilateral orders directing a deviation from a contract that has already been assented to by the parties.[2] Otherwise, major construction, in which large sums of money have been committed, could come to a standstill while the parties negotiate and try to come to an agreement on a modification to their contract. This being the case, the contractors only remedy is to seek additional compensation if it believes that the adjustment allocated by the owner is insufficient. Paragraph 14(b) deals with the equitable adjustment of the contract price when changes to work have been made in accordance with paragraph 14(a). Of course, all contracts may be amended at any time by the mutual assent of the parties and the procedure therefor need not be expressed in the agreement.

School Board approval was properly obtained for the work unilaterally initiated by the School District pursuant to paragraph 14(a). Acmat became obligated to perform the work whether it wanted to or not because it was within the general scope of the contract and because paragraph 14(a) left it with no choice. However, the School District cannot unilaterally dictate the compensation to be paid for this work. Paragraph 14(b) sets forth a formula to make the adjustment but the School District cannot dictate the amount of the net costs to be used in the calculation. The final sentence of paragraph 14(b) which attempts to give the School District this right is a nullity and must be disregarded.[3] Thus, the price adjustment for work ordered under paragraph 14(a) must be mutually assented to by the parties in a change order or left for the determination of the trier of fact.

Change Order No. 1 to the Rush School Contract is a case in point. The School District decided that it wanted to clean the

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2. Paragraph 14(a) refers only to changes by the School District and makes no mention of assent by Acmat.

3. Discussion of this issue begins on page 23.

personal property stored in closets and cabinets. It directed Acmat to do the work pursuant to paragraph 14(a) and School Board approval was obtained. See Mattleman affidavit sworn to August 15, 1988. Although a "proceed order" could have issued at that point, the School District attempted to make an agreement with Acmat for the fixed price of $63,282.89 and issued a change order for its signature. Acmat balked at the price and reserved its right to seek additional compensation and so stated in the change order. Thus, Acmat was asserting its right to seek an equitable adjustment under paragraph 14(b). However, the School District unilaterally crossed out Acmat's language and stated that it had the absolute right to dictate the price to be paid for the change. See Exhibit "2" annexed hereto. Thus, it is clear that there was no "meeting of the minds" as to the price for this change and Acmat proceeded with the work in accordance with paragraph 14(a) of the contract. The claimed amount for performing this work is in the sum of $148,398.22.

Another interesting situation arose from the additional work unilaterally directed by the School District and approved by the School Board at the Fairhill School. According to the documentation annexed hereto, the Board approved the addition of a work practices supplement to the contract. See Exhibit "3". The School District and the Board had this right pursuant to paragraph 14(a) of the contract and Acmat became obligated to perform as directed. However, no change order has been produced showing Acmat's assent to a price. The documentary evidence shows only a proposal by Acmat to apply one coat of encapsulating sealer at soffits. It does not show an agreement to perform the sealer work for a fixed amount and certainly does not show an agreement to 23 pages of work practices at any price. In the final analysis, Acmat was required by paragraph 14(a) to perform in accordance with the work practices supplement, but never agreed to a price. The School District's memorandum to file appears to be simply a self-serving hearsay document which is entitled to little or no consideration. Accordingly, all of Acmat's claims arising out of performance of the work practices supplement are entitled to an equitable adjustment.

The first claim in the sum of $18,000 is for the sealant referred to previously.

The claim involving the removal of carpet is an item to be equitably adjusted.

Other claims arising from the work practices supplement are contained in the claim designated as No. 8. It includes the work imposed on Acmat by the supplement and the breaches committed by the School District in its implementation.

B. Paragraph 14(c) is a differing site condition clause and governs the changes that were unexpectedly encountered at the Project.

The agreements contain a differing site condition clause that is designed to deal with conditions that differ from those set forth in the contract documents or which are normally found in construction. It has nothing whatsoever to do with changes within the scope of the contract which are unilaterally ordered by the School District pursuant to paragraph 14(a) or changes outside the scope of the contract which require the assent of both parties and the School Board pursuant to 24 Fa. Stat. Ann. § 5-508.

Differing site condition clauses became commonplace in government contracts during the last 25 years in order to hold down the cost of construction. Without a differing site condition clause, contractors assume the risk of unexpected costs and difficulties which can be sustained when differing site conditions are encountered. Consequently, bids were exaggerated to cover unknown contingencies which might never occur. Government entities found that they could save money on their overall expenditures for construction if they contracted for the proposed work without a mark-up for contingencies since a large number of projects were being built without encountering different conditions. Thus, there was a net savings, even though, some projects cost more because of unexpected contingencies. Consequently, the differing site condition clause allows a builder to bid a project safe in the knowledge that it will be equitably compensated if an unexpected condition arises.

It is well documented that Acmat encountered conditions on these projects which were different from what was described on the plans and specifications and different from anything else it had experienced in its long history of asbestos abatement.

The issue is whether the differing site conditions clause in paragraph 14(c) is modified by the unilateral changes clause found in paragraph 14(a). The answer was given in the negative by the Pennsylvania Supreme Court in *Teodori v. Penn Hill School District Authority,* 413 Pa. 127, 196 A.2d 306 (1964). In *Teodori* an excavation contractor encountered a differing site condition that caused it to perform additional work and to experience a delay. The contractual language was very similar to the wording used by the School District in the case at bar. The contract contained a differing site condition clause, an extra work provision and a section for computing payment for extra work. The Court found that the differing site condition clause was separate and apart from the provisions for extra work.

The following pertinent remarks were made by the Supreme Court of Pennsylvania:

> Authority next argues that the contract between the parties provided no agreement to pay for extra work in the amount claimed by Teodori. This contention is based upon the "Changes and Alterations" section of the contract, which clearly provides that such "changes and alterations" be made by written order. This argument completely ignores the section of the contract dealing with "Conditions Differing From Those Shown On Plans Or Indicated In Specifications", set forth in full above. The parties obviously contemplated the possibility of the exact type of contingency which arose, and provided for it in the contract.
>
> We agree with the conclusion of the court below, that Teodori's right to extra compensation, if any, is governed by the "differing conditions" clause, and not by the "changes and alterations" clause, the extra compensation not being sought for "changes" and/or "alterations" as those terms were used in the contract.

Nor are we moved by Authority's argument that the award of extra compensation is contrary to the provisions of the School Code or Municipality Authorities Act. The statutory authority for Authority to award contracts is contained in the Municipality Authorities Act of 1945, as amended by the Act of May 6, 1957, P.L. 112, Sec.1, 53 P.S. §312. That act provides, in substance, that contracts for construction and repair work involving a cost in excess of $1,000.00, shall be awarded only on the basis of competitive bids.

The contract in the instant case was entered into under circumstances which fully complied with the above statute. The extra work which the plaintiff was required to do and upon which his claim is based was a natural extension of the quantum of the work contemplated by the original contract and was clearly covered by an express provision thereof. No work not encompassed in the original contract was presented by discovery of the gasoline line, and thus no physical changes or alterations in the contract documents were necessitated thereby. The end product of the site preparation remained exactly as originally planned; only the manner of accomplishing it was affected. The contract unequivocally provided for this contingency, and the plaintiff had a clear contractual right to adjust his method of operation and to recover his additional costs within the contract framework.

Here, the contract foresaw the possibility of what actually occurred, and Teodori complied with the governing provisions of the contract. The architect investigated the conditions, found them materially different from those shown or indicated in the plans and specifications and made the necessary changes for the conduct of the work, thereby entitling Teodori to an increase in compensation in accordance with the "Extra Work" section of the contract. *Teodori v. Penn Hills School District Authority,* 196 A.2d at 309.

Thus, it is quite apparent that procedures for additional work caused by differing site conditions are independent from these governing additional work under the changes clause in paragraph 14(a). The only link between paragraphs 14(a) and 14(c) is that the cost for additional work is to be calculated in accordance with paragraph 14(b). Paragraph 14(c) specifically states that "[a]ny increase or decrease of cost resulting from such changes shall be adjusted in the manner provided herein for adjustment as to changes." This is a clear reference to paragraph 14(b) since it deals with costs due to changes made under paragraph 14(a).

Accordingly, paragraphs 14(a) and 14(c) are separate and distinct from each other. Changes that are caused by differing site conditions do not require School Board approval and need not be in writing. See *Teodori v. Penn Hill School District Authority*, supra.

C. The site inspection clauses have no bearing on the claims asserted by Acmat.

Reliance on the site investigation clause of the contracts to nullify paragraph 14(c) is misplaced. The courts are reluctant to read such exculpatory clauses broadly and to relieve owners of their liability for changed conditions. An interpretation which shifts the risk of differing site conditions to the contractor would render paragraph 14(c) meaningless and undermine the very reasons for its insertion in the contracts. It must be remembered that differing site condition clauses were inserted by government entities to reduce the cost of construction. An interpretation which voids paragraph 14(c) on this basis would allow an owner to reduce a contractor's price and then deny an equitable adjustment if a differing site condition is found. See *Town of Longboat Key v. Carl E. Widell & Son*, 362 So.2d 719. (Fla. 2nd DCA 1978).

In *United Contractors v. U.S.*, 368 F.2d 585, 598, the court wrote the following:

> But we have held, in comparable circumstances, that board exculpatory clauses (identical in effect with this one) cannot

> be given their full literal reach, and 'do not relieve the defendant of liability for changed conditions as the broad language thereof would seem to indicate.' *Fehlhaber Corp. v. United States*, 151 F.Supp. 817, 825, 138 Ct.Cl. 571, 584 (1957), cert. denied, 355 U.S.877, 78 S. Ct. 141, 2 L.Ed.2d 108. As *Fehlhaber* said, general portions of the specifications should not lightly be read to override the Changed Conditions clause. Ibid. It takes clear and unambiguous language to do that, for 'the provision sought to be eliminated, or subordinated, is a standard mandatory clause of broad application * * * .' *Thompson Ramo Wooldridge Inc. v. United States*, 361 F.2d 222, 228, 175 Ct.Cl. __, __ (1966).

In *U.S. v. Spearin*, 248 U.S. 132, 137 (1918), the Supreme Court held:

> But the insertion of the articles prescribing the character, dimensions and location of the sewer imported a warranty that, if the specifications were complied with, the sewer would be adequate. This implied warranty is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume the responsibility for the work until completion and acceptance. The obligation to examine the site did not impose upon him the duty of making a diligent enquiry into the history of the locality with a view to determining, at his peril, whether the sewer specifically prescribed by the Government would prove adequate. The duty to check plans did not impose the obligation to pass upon their adequacy to accomplish the purpose in view. And the provision concerning contractor's responsibility cannot be construed as abridging rights arising under specific provisions of the contract.

Similar situations have also been reviewed by government boards of contract appeals which have special expertise in dealing with construction matters.

In *M.A. Mortenson Co.*, ASBCA No. 32918, 87-1 BCA ¶19,598 at pgs. 99,130, 99,131 (1987), the Board wrote:

> We have found that the Electrical Distribution drawings, coupled with a reasonable site investigation, would not have alerted appellant to the need for concrete and asphalt removal in addition to that required and specifically delineated in the removal drawings. Accordingly, even if the Government's contention, that appellant has the obligation to carefully review the entire contract for areas of concrete removal in addition to those specifically set forth, is correct, it is simply not applicable in light of our key finding.

See also, *Farnsworth & Chambers Co., Inc. v. U.S.*, 346 F.2d 577 (Ct. Cl. 1965).

Nor is the law different in Pennsylvania. Cases cited by the School District involve situations where the owner expressly stated that contract documents were not to be relied upon by the contractor and where the contractor expressly assumed all risks from conditions at the site. The contractor was placed on notice that it had to fully analyze the conditions at the site.

The 1955 contract at issue in *Montgomery v. City of Philadelphia*, 391 Pa. 607, 139 A.2d 347 (1958), did not contain a differing site condition clause. Moreover, the agreement expressly eliminated certain tests from being a part of the agreement and stipulated that the contractor assume the risk resulting from differing site conditions. The contract even included a *caveat emptor* type provision that "the contractor shall accept the site as he finds it".

Likewise, it seems that the contract at issue in *Nether Providence Township School Authority v. Thomas A. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), did not contain a differing site condition clause. It too placed full responsibility for knowing the conditions of the site on the contractor.[4]

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4. "A. It is the responsibility of, and it is hereby agreed that the contractor has, prior to signing of this contract, by following, or such other methods as he may desire to take, namely, by careful personal study of the contract, the plans, specifications, and all other documents and data pertaining to the project and by an examination of the site of the work, satisfied himself as to the nature and location of the work, the conformation of the ground, the character, quality, and quantity of the materials which will be required, the character of

Such is not the case in the matter at bar. The agreements refer to and incorporate the drawings and specifications for the project. Although the agreements contain two site inspection clauses they are vague and unspecific. They certainly do not shift the risk of conditions at the site to the contractor. Indeed, there is no indication that the site investigation clauses were intended for this purpose.

The first inspection clause is contained in paragraph 7 of the General Conditions and states the following:

> 7. CONDITIONS AFFECTING THE WORK
>
> (a) The Contractor shall be responsible for ascertaining the nature and location of the work and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the School District. The School District assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the receipt and opening of bids other than by a bulletin or addendum that is duly issued.

The second site inspection clause is contained on page SC-02 of the Special Conditions and reads as follows:

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equipment and facilities needed preliminary to and during the prosecution of the work, the general and local conditions, and of all other matters which can in any way affect the work under this Contract.

No oral Agreement or conversation with any officer, agent or employee of the owner, school district, architect, or consultant, either before or after the execution of this contract, shall affect or modify any of the terms or obligations herein contained. Failure to comply with any or all of the above requirements will not relieve the contractor from the responsibility of properly estimating the difficulty or costs of successful completion of the work nor from the responsibility for the faithful performance of the provisions of this contract." *Nether Providence Township School Authority*, 476 A.2d at 906.

SC-07 *EXAMINATION OF THE SITE*

> The contractor bidding on this work must inspect the sites before submitting the proposal and will be responsible for informing himself fully on all determinable, existing conditions and limitations of the sites and will assume responsibility for all charges and costs resulting from his failure to verify same.

Apart from the ambiguity created by having two site inspection provisions in different parts of the agreement, it is clear that the clauses read alone or together do not require the type of exhaustive site inspection that the School District now wishes to retroactively impose. Essentially the two clauses require the type of inspection in which a prospective bidder visually ascertains the physical limitations of the project. They do not require penetrations into the walls and ceilings. The latter clause is significant in using the words "determinable, existing conditions". Obviously, the clauses were intended to be compatible with the differing site condition clause referred to earlier. Simply put, the site investigation clauses do not shift responsibility to the contractor to learn of every hidden condition that may be lurking behind the walls and ceilings of the building. This is especially the case where the contractor is relying on a contractual provision to compensate it for unknown conditions. This interpretation is even more compelling in the situation at bar where the conditions exist in a fully constructed building. This is not a case where the ground is readily available to an excavation contractor to do whatever tests it may wish to perform. In this instance, it seems that a full investigation would have required demolition of existing structures. There can be no serious doubt that the School District would have forbidden such an inspection.

It is respectfully submitted that Acmat must be judged by what a reasonable contractor experienced in the field of asbestos abatement would have done and that is a question for the trier of fact. See *Stock & Grove, Inc. v. U.S.*, 493 F. 2d 629 (Cl.Ct. 1974). Interestingly, page 1010-1 of the specifications to the Rush contract summarizes the work to be performed and

indicates that it is above the ceiling line and only in the areas located on the drawings furnished by the School District.

DIVISION I – GENERAL REQUIREMENTS

1.01 *SUMMARY OF THE WORK*

A. Contractor shall supply all labor, materials, services and equipment required to remove and discard all existing acoustic ceiling tile panels *from the areas above which* the structural steel beams, bar joints, metal form decking, and all other surfaces are covered with asbestos containing fireproofing materials *as located on the accompanying drawings*. Emphasis supplied.

The fact that the School District was placed on notice of the differing site conditions and other situations that arose is evidenced by the volumes of correspondence that passed between Acmat and the School District. In most instances the School District acknowledged that the work had to be performed and there were even times when attempts were made to reach an amicable resolution of the costs involved in performing the additional work. Indeed, the record shows that inspectors and other School District employees and consultants were frequently at the site and aware of all conditions as they were discovered. Verbal instructions which may have been given with regard to differing site conditions were entirely appropriate since they would deal with matters which were clearly contemplated by the contract documents, in particular, paragraph 14(c).

While the cause of certain claims or parts of claims may be designated to one or more categories, the following involve differing site conditions:

Rush	2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 20, 23, 24, 25, 26, 28, and 29.
Lincoln	3
Fairhill	2, 3 and 10

It is respectfully submitted that the question of whether the aforementioned wok constitutes a differing site condition is a

question of fact for the jury. They must determine whether a reasonable contractor under these circumstances would have foreseen the changed conditions experienced by Acmat.

Another interesting aspect of this item of damages is the supplemental agreement adding the first floor to the Rush School. Since the proposed work was outside the scope of the original contract, a new agreement and approval of the School Board was required to satisfy the requirements of 24 Pa. Stat. Ann. §5-508. However, an examination of the documentation surrounding this transaction and the affidavit of Henry Nozko, Jr., sworn to on June 6, 1989, helps to clarify and define the Supplemental Agreement. The July 3, 1984 letter, which is incorporated into the agreement, sets forth the sum of $595,000 for those conditions which are the *same* as those on the second floor and the further sum of $61,019 for additional items on the first floor which were *found* to exist at that time.

Robert F. Sullivan's memorandum to the file dated July 3, 1984, explains that the gym, auditorium and kitchen areas had been identified on that date as different and they were approached as *major added* costs and assigned a price. The price was not, therefore, the total cost for the first floor. Any other conditions at the site that differed from the second floor were to be treated as differing site conditions under paragraph 14(c). The memorandum states that the differing site work would be performed at the same rates as the second floor and explained that the premise for this approach was that Acmat's work should extend to the first floor on a prorata basis.

The following pertinent language appears in the July 3, 1984 memorandum:

> An initial cost breakdown for the first floor was submitted amounting to $780,000. This was subsequently negotiated to $595,000.00 based on the School District's position that the area to have the asbestos removed was the same on both floors.
>
> After a detailed review of the plans for the building and a visit to the school, another meeting was held on June 27th to negotiate differences between the two floors of the

building *that had been identified,* such as the gym, auditorium and kitchen areas. Attending the meeting were Henry Nozko, Sr., Henry Nozko, Jr. of Acmat Corp. and Messrs. Sullivan, Krupinsky, Glenn and Dr. Guth, consultant. *Agreement was reached that Acmat Corp. would perform the work utilizing the same rates in pricing the first floor as was applied to their Contract B-216 for the second floor. The premise for this approach is that Acmat Corp. is the low qualified contractor to receive the Board award and should logically extend their work to the first floor on a prorata basis.*

The base price for the first floor was set at $595,000.00 to which additional requirements were added as outlined below.

The major added costs are:

1. Asbestos removal from beams in gymnasium	$30,000.00
2. Cost for removal and replacement of metal pan ceiling in kitchen	20,000.00
3. Removal of asbestos from boiler room	11,000.00
	$61,000.00
Base Price	595,000.00
Total price for first floor	656,000.00

Emphasis supplied.

The intent of the contract is further explained in the School District's letter of November 21, 1984, signed by Dr. Bernard Rafferty and Eugene F. Brazil.

The second floor of the building was used as the model for comparison to the first floor in negotiations between the School District and ACMAT. To the extent that there is a substantial difference in the quantity of asbestos to be removed or in the nature of the asbestos to be removed, we agreed that an extra or a credit would be given depending upon whether the quantity of the work was greater or lesser or the nature of the asbestos differed.

Thus, the parties anticipated that different conditions than those identified could be encountered on the first floor of the Rush School and would result in an appropriate adjustment in price. They were uncertain as to what conditions existed and in effect agreed that they should be treated as differing site conditions pursuant to paragraph 14(c). If nothing else, a question of fact exists over the parties' intent in entering into the Supplemental Agreement. For the reasons discussed previously and on the basis of the foregoing argument, the site inspection clauses have no impact an the work performed on the first floor of the Rush School.

D. The provision making the School District the final arbitrator of costs is null and void.

The final sentence of paragraph 14(b) which attempts to make the School District the final arbitrator as to net costs is void as against public policy. Initially, it is noted that there is an ambiguity as to whether the language refers to both increases and decreases in the contract price. The language appears in the sentence that concludes the terms dealing with decreases in compensation. It is submitted that it does not impact on increases in cost.

Perhaps more significant is the fact that language which leaves a decision of this matter in the hands of one of the parties to a contract is void as a matter of public policy.

In *Abramovich v. Pennsylvania Liquor Control Board*, 490 Pa. 290, 416 A.2d 474 (1980), the Court reviewed a situation where an individual who acted as legal counsel to the Pennsylvania Liquor Control Board also acted as an arbitrator in a proceeding involving the Board. The Court reversed the Commonwealth Court's order affirming the award made by this individual and stated:

> In an arbitration proceeding a party is entitled to a 'full and fair' hearing. *Smaligo v. Fireman's Fire Insurance Co.*, 432 Pa. 133, 247 A.2d 577 (1968). As this Court has previously held, procedural due process requires that a fair hearing be

> conducted by one not involved with a party to the proceeding. See *Dussia v. Barger*, 466 Pa. 152, 351 A.2d 667 (1976) (unconstitutional commingling of investigative and adjudicative functions where Commissioner of State Police had sole discretion to investigate and determine guilt of state trooper). *Abramovich v. Pa. Liquor Control Board*, 416 A.2d at 474-475.

In *John F. Harkins Co., Inc. v. School District of Philadelphia*, 460 A.2d 260 (Sup. Ct. 1983), the plaintiff was seeking an equitable adjustment in addition to the amount already paid by the School District on account of work that it was directed to perform. The same language with regard to the finality of School District decisions did not preclude the contractor from offering proof of additional damages.

> Our independent review of the record persuades us that this was error. In the first place, the school district was to be the final arbiter of the contractor's net cost. Pursuant to the provisions of the contract, it made a determination of appellee's net increase in the cost of labor and made payment accordingly. *The burden of proving by a fair preponderance of the evidence that additional damages had been incurred was on the contractor. John F. Harkin*, supra at page 265. Emphasis supplied.

The adverse decision in *Harkins*, supra, was due to the plaintiff's failure to satisfy its burden of proof and not because of any contractual bar to its being able to offer evidence on the issue of damages. Accordingly, it is submitted that while the Court properly found the School District responsible for certain equitable adjustments, it incorrectly adopted the amount allocated by the School District. Likewise, the failure of the School District to allocate any amount to other claims should not have been a bar to consideration by a jury.

Simply put, the School District cannot be the final and conclusive arbitrator over its own disputes. The Court's finding to the contrary should be withdrawn to permit the trier of fact to determine the issue.

POINT 11

THE CLAIMS FOR BREACH OF CONTRACT ARE ENTITLED TO ADJUDICATION AS PROVIDED BY THE COMMON LAW

Until this point, the argument has concerned itself primarily with the operation of the contract over claims that are entitled to equitable adjustment as defined by the agreement. The argument now addresses those claims made for common law breach of contract.

A. Acmat is entitled to damages for work performed beyond the scope of the contract, but which are claimed by the School District to be included in the agreement.

It is not unusual for parties to a construction contract to disagree over whether certain work directed by an owner is included or excluded from the scope of the contract. After all, the contract documents, which include a form of agreement, general conditions, specifications and drawings, are often subject to interpretation during the pendency of a project. A claim arises when the parties cannot agree to whether work is included in the scope of their contract. When this situation arises, a contractor will often do the work under protest and assert a claim. *Williston on Contracts*, Vol. 3, rev. ed. §704, at page 2027; *Shalman v. Board of Ed. of Central Sch. Dist. No. 1*, 31 A.D.2d 338, 297 N.Y.S.2d 1000, 1003 (3rd Dept. 1969).

Protest work is not a claim for extra work per se, but a claim for breach of contract. Therefore, it would be inappropriate to impose a requirement that School Board approval be obtained prior to suit on these claims. Such approval would never be forthcoming and it would be analogous to asking a breaching party to a contract for permission to sue. Claims which are based on disagreement over scope include the following:

Rush	2, 12, 14, 21, 22, 23, 24, 31
Lincoln	1, 6, 7, 9 and 10
Fairhill	2, 3, 5, 8 and 9

Another aspect of the breach of contract claim deals with the manner in which the School District managed the contract. The School District unreasonably interfered with construction by failing to heat the premises, allowing the elevator to stop functioning, conducting improper inspections and reinspections, conducting late inspections and issuing defective plans and specifications. The School District's interference with Acmat's work is well documented. It is clear that an owner may not impede the progress of a contractor. Yet that is precisely what the School District did when it ordered the cleaning of closets and rails at the Rush School after the area was fully cleaned. As a consequence, the entire floor became recontaminated and had to be recleaned at great additional expense and time. The failure to heat the building caused flooding and additional cleaning. School personnel contaminated restricted areas by entering them without taking appropriate precautions. Upon information and belief, a work stoppage was ordered at the Lincoln School and there were late test reports and delayed responses when directions were requested.

Clearly, the School District impeded progress and interfered with the planned sequence of work at the project. It is submitted that this entitles Acmat to just compensation for breach of contract. See *Lester N. Johnson Co. v. Spokane*, 22 Wash. App. 265, 588 P.2d 1214 (Wash. App. 1978).

Perhaps most egregious was the arbitrary and capricious way in which the School District conducted its inspections. While the agreements provided for inspections it is alleged that they were conducted in an unreasonable manner. Initially, it is noted that the specifications were defective. The requirement of many air exchanges a day while at the same time requiring dust free surfaces was impossible to comply with in the City of Philadelphia. The fumes, dirt and dust carried into the building by the air exchanges made an absolute dust free environment impossible. The Government warrants that its plans and specifications are free of defects and, therefore, a contractor is entitled to be compensated for the extra costs incurred in trying to comply with them. *U.S. v. Spearin*, 248 U.S. 132, 39 S.Ct.

59, 63 L.Ed. 166 (1918); *Dept. of Natural Resources and Conservation of the State of Montana v. U.S.*, 1 Cl.Ct. 727 (Cl.Ct. 1983).

Even if it could be claimed that the specifications were not defective, the implementation of the specifications were improper. The episode involving the snaping of a map thereby creating dust stands out as an example, as does the delay in conducting inspections and in reporting their results to Acmat. Limitations on government inspections generally fall into four categories: (1) unreasonable delay, (2) inadequate tests, (3) changing contract requirements and (4) interference with performance. See Briefing Papers, *The Inspection Clause*, The Government Contractor, No. 88-10, September 1988, annexed as Exhibit "4"; *Texas v. Buckner Construction Co.*, 704 S.W.2d 837 (Tex. App. 14 Dist. 1985), and *Adams v. U.S.* 358 F.2d 986. (Ct. Cl. 1966).

Accordingly, all of the additional work associated with the excessive inspections are compensable and are entitled to be submitted to a jury.

POINT III

THE CONTRACT DOES NOT PRECLUDE ACMAT'S CLAIM FOR DAMAGES DUE TO DELAY

Another exculpatory provision relied on by the School District is the one dealing with delays.[5] Clauses such as these are not taken literally and exceptions have been created in order to implement their true purpose.

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5. If any contractor shall be delayed in the completion of his work by reason of unforeseeable causes beyond his control and without his fault or negligence, including but not restricted to, acts of God, acts or neglect of the School District, acts or neglect of any other contractor, fires, floods, epidemics, quarantine restrictions, strikes, or freight embargoes, the period hereinabove specified for completion of his work may be extended by such time as shall be fixed by the School District, but the contractor shall not be entitled to any damages or compensation from the School District on account of any delay or delays resulting from any of the aforesaid causes.

Notwithstanding a "no damages for delay" clause, parties have been able to recover delay costs in four situations: (1) when the delay was not of a kind contemplated by the parties; (2) when the length of the delay was unreasonable; (3) when there was evidence of bad faith; and (4) when the delay was caused by active interference.

The rationale for this is the implied obligation of the owner to refrain from interfering with a contractor's work, especially where it has sought to insulate itself from liability for delay with a "no damage for delay" clause.

In Pennsylvania this principle was recently addressed by the Supreme Court in *Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 506 A.2d 862, 865, 866 (1986):

> The rule in Pennsylvania is that exculpatory provisions in a contract cannot be raised as a defense where (1) there is an affirmative or positive interference by the owner with the contractor's work, or (2) there is a failure on the part of the owner to act in some essential matter necessary to the prosecution of the work. *Gasparini Excavating Co. v. Pennsylvania Turnpike Commission*, 409 Pa. 465, 187 A.2d 157 (1963); See *Commonwealth of Pennsylvania State Highway and Bridge Authority v. General Asphalt Paving Company*, 46 Pa.Cmwlth. 114, 405 A.2d 1138 (1979) (in spite of contract provisions excluding claims for additional compensation due to delay caused by the owner, contractor awarded additional compensation for three month delay caused by Commonwealth's direct interference in failing to have a water main expeditiously relocated), and *Commonwealth of Pennsylvania, Department of Highways v. S.J. Groves and Sons Co.*, 20 Pa.Cmwlth. 526, 343 A.2d 72 (1975) (exculpatory provisions of contract held not to prevent recovery by contractor of increased costs in performing due to a fourteen week delay while AT & T relocated a coaxial conduit). "[W]here an owner by an unwarranted positive act interferes with the execution of a contract, or where the owner unreasonably neglects to perform an essential element of the work in furtherance thereof, to the

> detriment of the contractor, [the owner] will be liable for damages resulting therefrom." *Henry Shenk Company* v. *Erie County*, 319 Pa. 100, 178 A.662 (1935).

Gasparini, supra is particularly interesting because the Court allowed damages for delay because of a failure on the part of the defendant to properly coordinate construction activities at the site.

It is submitted that the facts underlying Acmat's claim for delay show an entitlement to damages and it should be afforded the opportunity to present such claims to the jury.

Delays caused by unanticipated changes at the job site are certainly compensable. In addition, the School District's breaches, including unreasonable inspection requirements and delays in inspection all impacted on the progress of the job. It constituted an active interference. Other examples are the loss of elevator service and loss of efficiency because of a failure to heat the building during the winter season.

Indeed, the policy that prohibits an owner from interfering with a contractor's work is so strong that a clause absolving the owner from responsibility for delays due to its negligence will rarely be upheld.

In *Ozark Dam Constructors* v. *U.S.*, 127 F.Supp. 187, 190, 191, (Ct.Cl. 1955), the Court wrote:

> A contract for immunity from the harmful consequences of one's own negligence always presents a serious question of public policy. That question seems to us to be particularly serious when, as in to his case, if the Government got such an immunity, it bought it by requiring bidders on a public contract to increase their bids to cover the contingency of damages caused to them by the negligence of the Government's agents. Why the Government would want to buy and pay for such an immunity is hard to imagine. If it does, by such a provision in the contract, get the coveted privilege, it will win an occasional battle, but lose the war.
>
> We do not say that a provision for non-liability such as was inserted in the instant contract may not be effective with

> regard to some kinds or degrees of negligence. We do say that the Government's position that the provision must be taken literally, so that the Government is not liable to the consequences of any conduct whatever of its representatives, is wrong.
>
> * * *
>
> Our conclusion is that the non-liability provision in the contract, when fairly interpreted in the light of public policy, and of the rational intention of the parties, did not provide for immunity from liability in circumstances such as are recited in the plaintiffs petition.

Surely, such acts as the School District's failure to heat the Rush School, to allow pipes to burst and flood the building constitute the types of conduct, negligence and inconsideration that are compensable.

Accordingly, the School District cannot exculpate itself from liability for delays under the circumstances of this case.

POINT IV

THE PROVISION OF THE SCHOOL CODE REQUIRING SCHOOL BOARD APPROVAL HAS NO BEARING ON THE CLAIMS ASSERTED

The Supreme Court in *Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306, made it clear that claims of the type asserted herein are not barred by the failure to have School Board approval. The work giving rise to many of the claims was expressly covered by the differing site condition clause of the agreement. The breach of contract claims involve a failure on the part of the School District to live up to its end of the bargain and are compensable on common law principles. Other claims involve the amount to be paid for work properly approved by the School Board. The contract provides for an equitable adjustment in such instances and the School District may not dictate the amount to be paid to the contractor.

POINT V

THE CLAIMS FOR QUANTUM MERUIT SHOULD BE REINSTATED

In *Derry Township School District* v. *Suburban Roofing Co., Inc.*, 517 A.2d 225 (Pa. Cmwlth. 1986), the Court recognized that quantum meruit was an appropriate theory for claims that did not require School Board approval.

The Court wrote in pertinent part:

> The District misrepresents the Contractor's claim which is not for compensation for extra work performed under changes to the contract, rather, the Contractor is asserting a claim for its reasonable costs incurred in reliance upon the District's interpretation of the Contractor's performance under the terms of the contract, which interpretation the District later altered to the Contractor's detriment. This is a proper case for equitable estoppel. In *Department of Environmental Resources* v. *Dixon Contracting Co., Inc.*, 80 Pa. Commonwealth Ct. 438, 471 A.2d 934 (1984), we held that equitable estoppel can be applied to a governmental agency to preclude that agency from depriving a person of a reasonable expectation when such agency knew or should have known that such person would rely upon the representation of the agency. Id. at 443, 471 A.2d at 936-937; see also, *De Frank* v. *County of Greene*, 50 Pa. Commonwealth Ct. 30, 412 A2d 663 (1980).
>
> We also distinguish this case from the circumstances in *Nether Providence Township School Authority* v. *Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A. 2d 904 (1984), upon which the District heavily relies. In *Nether Providence*, our Supreme Court held that public bodies cannot waive written authorization requirements in public contracts even if the waivers are in writing. There, the contractor sought to be compensated for extra work performed under a change order not approved by the school board as required under the terms of the contract. The

> Contractor here is not claiming increased costs due to extra work incurred by the District's oral changes to the contract, rather the Contractor is claiming compensation for costs which it reasonably incurred in reliance upon the District's interpretation of its performance under the contract. *Derry Township School District*, supra at page 229.

Thus, quantum meruit stands as a separate basis for recovery of those claims based upon the scope of work and those acts alleged to be a breach of contract.

POINT VI

AN INTERPRETATION OF THE CONTRACT IN THE FOREGOING MANNER PRECLUDES SUMMARY JUDGMENT DISMISSAL OF THE COMPLAINT

It is submitted that an interpretation of the contracts in the foregoing manner is the only one which is logical in the context of the construction performed by Acmat. The provisions of the contract simply do not preclude the maintenance of this action and judgment dismissing the great majority of the claims and allocating an amount for other claims was clearly inappropriate. Genuine issues of material fact exist and are entitled to be heard by the trier of fact.

In *Schulman v. Continental Bank*, 513 F.Supp. 979, 983 (E.D. Pa. 1981), the Court reiterated the guiding principles in considering motions for summary judgment:

> I turn now to an analysis of the issues raised by the instant motion. The standards governing a motion for summary judgment are well settled; however, a few observations about those principles bear repeating here. Under Rule 56(c) of the Federal Rules of Civil Procedures, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." The moving party carries the initial burden of establishing that there is no

genuine issue of material fact, *Adickes v. S.H. Kress & Co.*, 398 U.S.144, 159-60, 90 S.Ct. 1598, 1609-10, 26 L-Ed.2d 142 (1970), and all inferences from the evidence must be drawn in favor of the party opposing the motion. *Small v. Seldows Stationery*, 617 F.2d 992, 994 (3d Cir. 1980). Further, summary judgment is not appropriate if there is 'the slightest doubt' concerning the material facts. *Tomalewski v. State Farm Life Insurance Co.*, 494 F.2d 882, 884 (3d Cir. 1974).

It is submitted that summary judgment is a drastic remedy and should be granted with caution so that a litigant will not be deprived of its day in Court.

Contractual language is often subject to more than one interpretation. The papers in opposition to the School District's motion for summary judgment and the papers submitted on reargument show this to be the case. It is submitted that certain factual determinations by a jury are necessary before a ruling can be made on the law.

In *Minter Roofing Co., Inc.* ASBCA Nos. 293387, 29897 and 31137, 87-1 BCA ¶ 19,386, the Board denied a motion for summary judgment where interpretation of a pre-bid inspection clause and a differing site condition clause required the factual determination of how a reasonable contractor would have conducted itself under the circumstances. The interpretation of the contractual provisions urged by Acmat make it clear that the School District has failed to satisfy its burden of proof that summary judgment can be granted as a matter of law.

CONCLUSION

Based upon the foregoing, it is respectfully requested that the Court withdraw its prior order granting partial summary judgment to the defendant and issue a new order denying the motion, except for the findings of School District liability previously made by the Court.

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